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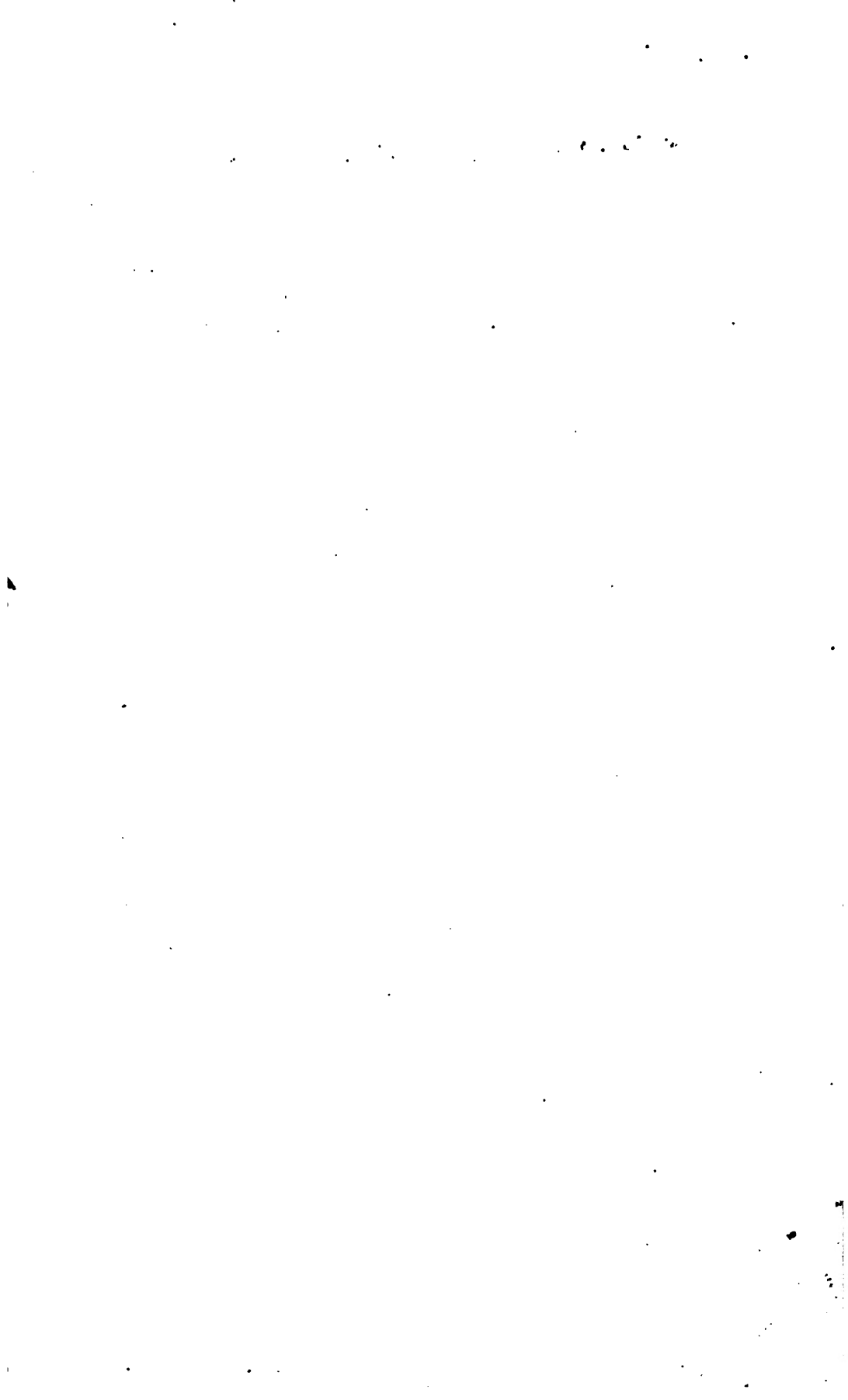
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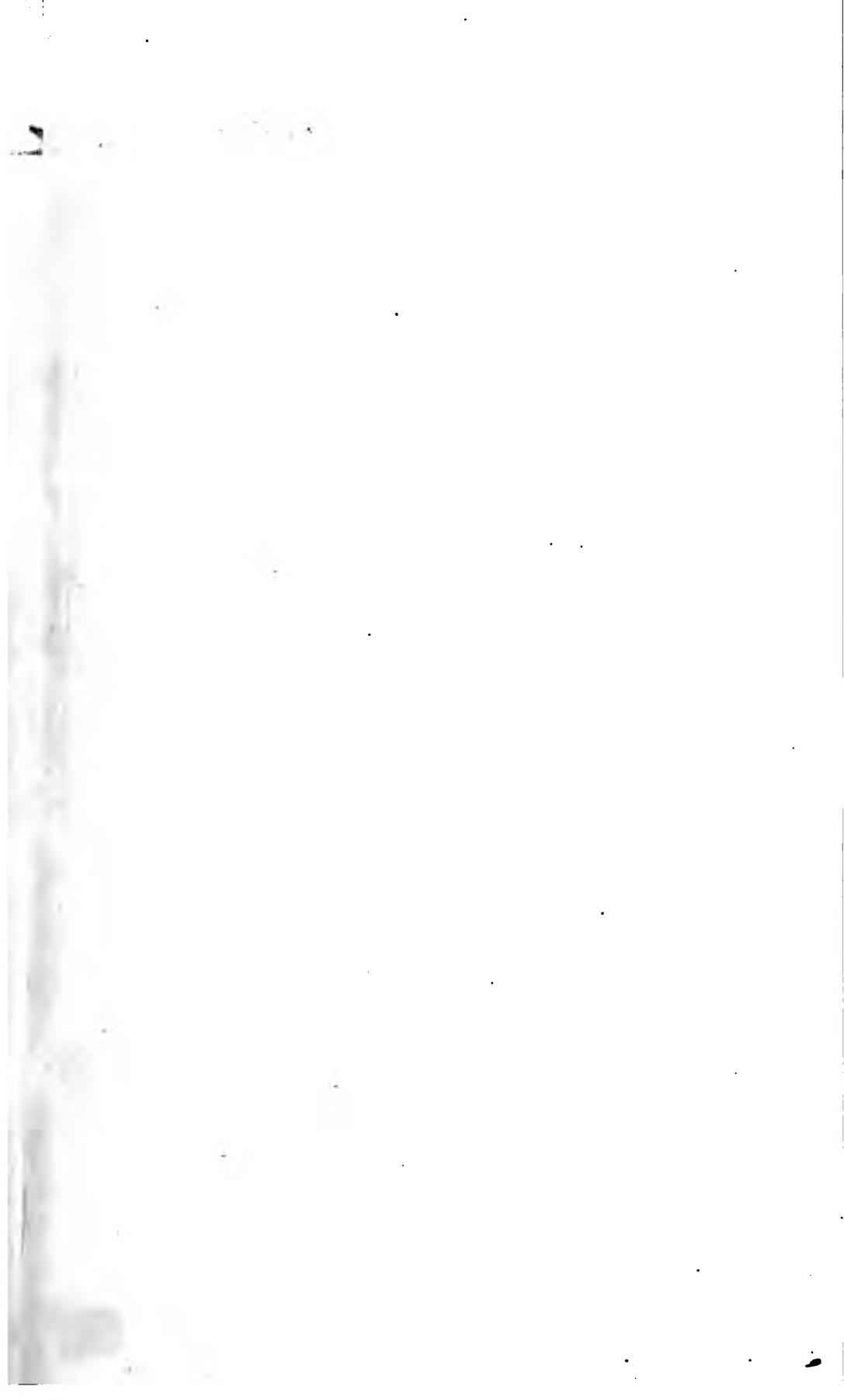
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James P. Treadwell



James D. Smith





REPORTS  
OF  
CASES  
ARGUED AND DETERMINED  
IN THE  
**English Courts of Chancery,**  
WITH  
NOTES AND REFERENCES  
TO ENGLISH AND AMERICAN DECISIONS,

~~~~~  
BY E. FITCH SMITH,  
COUNSELLOR AT LAW.  
~~~~~

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1854.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

LORD CHANCELLOR BROUGHAM.

~~~~~  
By JAMES RUSSELL AND J. W. MYLNE, Esqs.,  
BARRISTERS AT LAW.  
~~~~~

VOL. II.

1881.—1 & 2 WILL. IV.

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1854.

**L 1345**

**APR 7 1930**



LORD BROUGHAM,       -       -       *Lord High Chancellor.*  
SIR JOHN LEACH,       -       -       *Master of the Rolls.*  
SIR LANCELOT SHADWELL,       -       *Vice-Chancellor.*  
SIR THOMAS DENMAN,       -       -       *Attorney-General.*  
SIR WILLIAM HORNE,       -       -       *Solicitor-General.*



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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

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TATHAM v. WRIGHT.

1830: 18th November. 1831: 29th and 30th April, 11th May, 25th November  
A motion for a new trial of two issues, was made upon three grounds: 1st. The alleged improper summing up of the judge; 2d. Because the weight of evidence was against the verdict; and 3d. Because only one of the attesting witnesses was examined at the trial. The motion was refused on the ground that, upon the evidence alone, without regard to the summing up of the judge, the court would not have been satisfied if the jury had given a different verdict; and because the two attesting witnesses, who were not examined, were present in court on the trial of the issue, and tendered to the party moving for a new trial, who declined to examine them.

*Semble*, the rule is not universal, that, on the trial of an issue *devisavit vel non*, all the attesting witnesses must be examined at law.

*Semble*, that rule does not apply where the bill is filed by the heir at law to restrain the devisee from setting up a legal estate as a bar to the ejectment.

THE bill was filed by the heir at law of John Marsden, against the persons who took interests under a will of John Marsden, dated the 14th of June, 1822, and a codicil to it dated the 23d of February, 1826. The case stated by the plaintiff was, that the testator had been, from his youth upwards, weak, childish, and incapable of transacting business; that for more than twenty years before his death, he had been entirely under the control of his agent and steward, the defendant George Wright; that \*the will and codicil had been prepared by Wright's direction; and that Marsden, without comprehending the provisions of these instruments, which were extremely complex and

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Tatham v. Wright.

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artificial, executed them under Wright's control and influence. The prayer was, that the will might be declared to have been obtained by fraud and undue influence, and to be void.

The bill also alleged that the legal estate in Marsden's, freeholds was outstanding, and prayed that the defendants might be restrained from setting up any outstanding legal estate as a defence to an action at law which the plaintiff might commence. The defendants, by their answer, stated that a considerable part of the freeholds was vested in mortgagees, but they could not further set forth whether the legal estate of any part of the testator's lands was outstanding.

Many witnesses were examined in the cause, both on the part of the plaintiff and on the part of the defendants. Among those who were examined for the defendants were Mr. Bleasdale, the Rev. Robert Procter, and Edward Tatham, the three attesting witnesses to the will and codicil. Mr. Bleasdale was the attorney who prepared the will, and had known the testator from his infancy. He deposed in the most unequivocal manner to the perfect capacity of the testator to dispose of his property, to the due execution of the will and codicil, to their strict conformity to the testator's instructions and wishes, and to his perfect understanding of their import and effect.

Procter, in his examination in chief, stated that, at the time of the "execution of the will and codicil, John Marsden was of great imbecility of mind and of weak understanding, but [\*3] his memory was good on the few \*subjects upon which he conversed; and that he was capable of making a plain straight forward will or codicil to a limited extent." On his cross-examination he said that, "in his opinion and belief, John Marsden was totally incompetent to transact any business, or to manage his own affairs or property, or to give any proper directions or orders about the same; that he never was capable of knowing his own property, either as to extent or value, or of buying or selling, or contracting for any thing more than ten or twenty

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Tatham v. Wright.

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shillings in amount, or of giving instructions for any conveyances or leases; that he was totally incapable of giving directions for making calculations of the respective values of different lands, or of understanding in the least degree such calculations when made; that John Marsden had not the power to follow his own inclinations, or to act as he wished, without the restraint or control of the defendant George Wright, in matters of consequence, and that he had not a will of his own in such matters; that he did not think John Marsden was capable of giving written instructions or directions for his will to Giles Bleasdale, or to any other person; and that, in his opinion, John Marsden was not capable of comprehending, combining together, and judging accurately of the nature and consequences of any legal instrument, creating a variety of new rights and interests."

Edmund Tatham, in his examination in chief, stated that John Marsden was "of weak mind and deficient understanding, but was of sufficiently sound and disposing mind, memory and understanding to make a plain and simple will or codicil, though not to make an intricate or complicated will or codicil." In his cross-examination he deposed that "John Marsden was of a weak and defective judgment; that he was infirm in these respects throughout the whole of the period \*of the witness' acquaintance with him, up to the time of his last illness, which was after the year 1825; that he was liable to be made the dupe of designing and interested persons; that he was not capable of transacting business, or managing his own affairs or property, or of giving proper instructions or orders about the same; that he was not capable of comprehending, combining together, or judging accurately of the nature and consequence of any legal instrument creating a variety of new rights and interests; and that he seemed to be afraid of offending Wright." Both these witnesses entered, in their cross-examination, into minute details of circumstances, to corroborate their opinions of the extreme imbecility of Mr. Marsden.

Two issues of *devisavit vel non* were directed.

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On the trial the devisees, who were plaintiffs in the issues, called only Bleasdale to prove the due execution of the will and codicil, and did not examine either Procter or Tatham; but their counsel stated, that they had served *subpœnas* on both these persons; and that both of them were in court, and the defendant might examine them if he pleased. The defendant did not call them.

The issues were tried at York before Mr. Justice *Park*: the jury found a verdict in favor of the will and codicil, and the judge was satisfied with the verdict.

A motion for a new trial was now made on behalf of the heir.

Mr. *Brougham* and Mr. *Duckworth*, for the motion.

Mr. *Bickersteth*, Mr. *Frederick Pollock*, and Mr. *Walker*, *contra*.

[\*5] \*In support of the motion it was contended: 1st, that the Judge, in summing up, had not presented the evidence fully and fairly to the jury; 2d, that the verdict was not supported by the evidence; and 3d, that the plaintiffs in the issues were bound to have examined all the three attesting witnesses.

The argument on the first two points consisted of a commentary on the evidence of the witnesses who had been examined on the trial, and of criticisms on the observations made by the Judge.

On the third point it was contended, on behalf of the heir, that, on the trial of an issue of *devisavit vel non*, it was imperative on the party claiming under the will to examine all the three attesting witnesses. *Townsend v. Ives*, (a) *Ogle v. Cook*, (b) *Bullen v. Michel*, (c) *Bootle v. Blundell*. (d) The only exception from this rule was, when the circumstances were such, that, by the common rules of evidence, proof of the witness' handwriting might

(a) 1 Wilson, 216.

(b) 1 Ves. sen. 178.

(c) 2 Price, 399.

(d) 19 Ves. 494; Cooper, 136.

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Tatham v. Wright.

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be submitted for the testimony of the witness himself; as when the witness was dead, or was abroad, or was insane, or after diligent search could not be found: and it was to cases of this description that Lord Thurlow referred, when, in *Powel v. Cleaver*,<sup>(a)</sup> he expressed a doubt "whether the rule had ever been laid down so largely, that a will could not be proved without examining all the witnesses, although the practice had been to examine all."

On the other hand, the devisees contended that the rule requiring all the attesting witnesses to be examined, applied only where the devisees came into a court of equity to have the will established. In the present case \*they did not ask [\*6] the assistance of the court: they asked for no decree, except that the bill should be dismissed. The plaintiff in the suit had transferred the jurisdiction from a court of law to a court of equity, merely on the ground that outstanding legal estates might be set up to defeat any action which he might bring to recover possession: and, on the trial of an issue directed under such circumstances, it was sufficient to prove the will in the same way as it would have been proved in case he had brought an ejectment. Even if the bill had been filed by the devisees to have the will established, instead of being filed against them to have the will declared void, it would not have been incumbent on them, under the special circumstances of the case, to examine Procter and Tatham. Those persons, in their depositions in the cause, had given evidence against the validity of the will and codicil which they had solemnly attested: it would be absurd to consider them as the witnesses of the devisees, and unreasonable to require that they should be called by the parties against whom it was known they would depose. The rule was not inflexible and invariable; it would not be followed where its observance would tend to render the result less satisfactory to the conscience of the court. The interests of truth plainly required that Procter and Tatham, if examined at all, should be examined as the witnesses of the heir, and that the adverse party should have the power of cross-

(a) 2 Bro. C. C. 504.

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Tatham v. Wright.

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examining them. The heir might have examined them at the trial: he did not choose to do so; and a new trial would not be directed merely to give him an opportunity of doing what (if his counsel had deemed it prudent) he might have done before.

**THE MASTER OF THE ROLLS:—**This is a motion for a new trial of two issues, which have been directed by the court, in order to determine the validity of a will and codicil.

[\*7] \*The motion is made upon three grounds: first, the improper summing up of the learned Judge; second, that it was a verdict against the weight of evidence; and third, that one only of the three attesting witnesses has been examined at law. It appears that the other two attesting witnesses were present in court at the trial of the issues, and were tendered by the plaintiffs in the issues, to the defendant for examination, but that his counsel declined to examine them.

I have carefully read every word of the report of the learned Judge, but have purposely abstained from reading the short hand writer's notes of the summing up, in order that my judgment might be formed upon the evidence alone. Considering that this testator, throughout the course of a long life, had been received in the world as a person capable of legal contracts, and had entered into pecuniary engagements by borrowing money and by purchase and sale of property to a very large amount, and considering the description of witnesses who have been respectively examined on both sides, and the opportunities they repeatedly had of acquiring an accurate knowledge of the state of the testator's understanding, and comparing the nature of the testimony given by the respective witnesses, I am clearly of opinion that the weight of evidence is in favor of the competence of the testator, and that the jury have come to a sound conclusion on the subject.

As this opinion is formed without any reference to the summing up of the learned Judge, and as I should have considered it my duty to direct a new trial upon the evidence alone, whatever the summing up had been, if the jury had come to a different



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Tatham v. Wright.

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conclusion, it is not necessary to take any notice of the observations which have been made in that respect.

\*The effect of establishing a will in this court, is to con- [\*8]  
clude all future questions respecting its validity; and the  
caution of this court requires, therefore, before a will be estab-  
lished upon evidence here, that all the attesting witnesses shall  
be examined. If this court requires the aid of a court of law and  
the intervention of a jury to determine the validity of a will, it  
does not necessarily follow that a court of law must in such a case  
depart from its own rules, and adopt those of a court of equity.  
When all the witnesses are not examined in the court of law, and  
the cause comes on for further directions in a court of equity,  
there may be cases in which a court of equity, referring to its  
own principles, may not have its conscience fully satisfied  
by the verdict of the jury: as, for instance, where, the general  
competence of the testator being admitted, the question depends  
on the competency at the particular time of executing the will.  
There the attesting witnesses being the persons who can give the  
best testimony as to the special fact, it may be reasonable in the  
Court of Equity to send the case back, in order that all the wit-  
nesses may be examined. But when, as in the present case, the  
question depends not upon the particular state of the testator's  
mind at the making of the will, but upon his general competency  
throughout a long life, the attesting witnesses to the will may not  
be persons capable of speaking to the fact of general competency,  
and not, therefore, the most material witnesses in the considera-  
tion of a court of equity.

It is further to be observed, that the bill filed in this case is  
not by the devisees to establish the testamentary instrument,  
but it is a bill by the heir at law claiming against these instru-  
ments, to have a legal estate put out of his way, in order that he  
may try the validity of these instruments by ejectment,  
and no decree in this cause, \*would be conclusive upon [\*9]  
the question of the validity of the will. The plaintiff  
might, by redeeming the mortgage, get in the outstanding legal

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estate by an assignment of the mortgage; or even upon the hearing upon further directions, he might still contend that he ought not to be concluded by the trial of the issues, and that the Court of Equity should still permit him to proceed by restraining the defendants from opposing to him the legal estates.

It is not, however, for the present purpose, necessary to advert to these distinctions. The complaint that the two other witnesses were not examined, is made by the heir to whom they were tendered, who had full opportunity of examining them, but thought fit to decline that examination. He declined it because he wished to have the technical advantage, which by the rules of law results from considering those persons witnesses of his opponent. Can he, therefore, with effect say that it must be inferred that the witnesses, if examined, could have given evidence in his favor, when it was his own choice that such evidence should not be laid before the court?

The motion for a new trial must, therefore, be refused.

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The plaintiff moved before the Lord Chancellor for a new trial of the issues.

His Lordship having been counsel on the trial of the issues, and on the application for a new trial to the Master of the Rolls, requested the assistance of the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron: and the motion was heard before the Lord Chancellor, Lord Chief Justice *Tindal*, and Lord Lyndhurst.

[\*10]     \*Sir *J. Scarlett* and Mr. *Armstrong*, who supported the motion, and Mr. *F. Pollock* and Mr. *Tomlinson* who opposed it, in commenting upon the nature and effect of the evidence, and the manner in which the case had been left to the jury by the presiding Judge, pursued the same general line of argument which had been previously taken at the Rolls: but the third

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point, which involved the question how far the rule was imperative, that upon an issue of *devisavit vel non* all the attesting witnesses should be examined, stood over to a subsequent day, for the purpose of being argued separately by a single counsel on each side.

*May 11th.*—The *Solicitor-General* in support of the application, now contended, that, both upon general principles and upon the special circumstances of the case, all the attesting witnesses ought to have been examined, and that, inasmuch as the devisees, whose duty it was, as plaintiffs in the issue, to set up the will, had declined to examine them, a new trial must be directed of course, the former having miscarried. The sole object of granting such an issue, was to satisfy the conscience of the court upon a question respecting which, from the imperfect mode of taking evidence in equity, no sound judgment could be formed without resorting to the aid of a court of law. That course, however, would be an idle mockery, if the dexterity of an advocate, or the technical rules of *nisi prius* practice were suffered to defeat the ends of justice; and those ends are only to be attained by subjecting to a full and searching *viva voce* examination, all the individuals whose testimony could throw light upon the points referred to the determination of the jury. The rule, therefore, was imperative and universal that upon the trial of an issue of *devisavit vel non*, all the subscribing witnesses, if alive, and of sound mind, and resident within the jurisdiction, ought to be examined: and \*no distinction in this respect had ever [\*11] been suggested between cases where the devisees were plaintiffs in equity seeking to establish the will against the heir, and cases where they were defendants resisting his attempts to impeach it. *Boote v. Blundell*.<sup>(a)</sup> In *Winchelsea v. Wauchope*,<sup>(b)</sup> where the bill was filed by the heir, and the question turned solely upon the due execution of the will, it was one of the arguments urged in favor of the new trial which was eventually directed, that two only of the attesting witnesses had been

(a) 19 Ves. 494; Cooper, 136.

(b) 3 Russ. 441.

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called at the former trial. In *Lowe v. Jolliffe*,<sup>(a)</sup> upon an issue out of Chancery tried at bar, the examination of all the subscribing witnesses appears to have been required, although the effect of their evidence was strongly to impugn the validity of the instrument which they had themselves attested.

Independently of the general rule, there were circumstances which, in this case, rendered a second trial peculiarly necessary. The issues had not been directed as a mere matter of course, but the judicial attention of the court had been pointedly drawn to them. All the attesting witnesses were examined in equity, and two of them, Messrs. Procter and Tatham, were very fully cross-examined by the plaintiff, the heir at law. The result of their cross-examination went a great way towards shewing that the testator was utterly incompetent to make a complicated will like the one in question; and the court would never, in the face of that evidence, and without having the matter sifted to the bottom, declare itself satisfied with the verdict, especially in the case where, in consequence of the outstanding terms, the order [\*12] dismissing the bill might conclude the parties, and be tantamount to a formal decree establishing the will against all the world. In fact, the result of the trial at law, instead of being more satisfactory than the previous investigation here, was infinitely less so; for the important evidence of two of the attesting witnesses had been purposely withdrawn; and the finding of the jury, therefore, rested mainly on the testimony of the third witness, the only one whom the plaintiffs at law thought it proper or prudent to call; although, as all the three attested the will, and that instrument constituted the title which the devisees were bound to prove, they were, in truth, the witnesses of the devisees, and it was incumbent upon them, and not upon the heir, to examine them.

Sir *E. Sugden*, who appeared on the other side, was not called upon to argue the point.

(a) 1 W. Black. 365.

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*June 11th.*—Lord Chief Justice *Tindal*, on behalf of himself and the Lord Chief Baron, read the following judgment:

The application to this court for a new trial of the issue, which was directed in this case, has been made upon two grounds; first that, by the rule of this court, it was incumbent on the plaintiff, who supported the validity of the will, to call all the subscribing witnesses to the will; and that, inasmuch as he called one only, this court will not be satisfied with a verdict setting up the will; and secondly, that upon the evidence given in the cause, the verdict for the plaintiff ought not to be satisfactory to the court.

If there is any general rule in this court, that, in all cases, and under all circumstances, the plaintiff in an issue on the question, *devisavit vel non*, has the duty cast upon him of making the three attesting witnesses to \*the will, his own wit- [\*18] nesses upon the trial of the issue, if alive, or in a condition to give evidence, there would be no necessity for discussing the second ground of the motion; for, in the present case, two of the subscribing witnesses, who were alive and actually present in court under the *subpoena* of the plaintiffs in the issue, were not called as witnesses at the trial.

It may be taken to be generally true, that in cases where the devisee files a bill to set up and establish the will, and an issue is directed by the court upon the question, *devisavit vel non*, this court will not decree the establishment of the will, unless the devisee has called all the subscribing witnesses to the will, or accounted for their absence. And there is good reason for such a general rule. For as a decree in support of the will is final and conclusive against the heir, against whom an injunction would be granted if he should proceed to disturb the possession after the decree, it is but reasonable that he should have the opportunity of cross-examining all the witnesses to the will, before his right of trying the title of the devisee is taken from him. In that case, it is the devisee who asks for the interference of this court, and he ought not to obtain it until he has given every

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opportunity to the heir at law to dispute the validity of the will. This is the ground upon which the practice is put in the cases of *Ogle v. Cooke*(a) and *Townsend v. Ives*.(b) But it appears clearly from the whole of the reasoning of the Lord Chancellor in the case of *Bootle v. Blundell*.(c) that this rule, as a general rule, applies only to the case of a bill filed to establish the will (*an establishing bill*, as Lord Eldon calls it in one part of his [\*14] judgment), and an issue directed by the \*court upon that bill. And even in cases to which the rule generally applies, this court, it would seem, under particular circumstances, may dispense with the necessity of the three witnesses being called by the plaintiff in the issue. For, in *Lowe v. Jolliffe*.(d) where the bill was filed by the devisees under the will,(e) and an issue, *devisavit vel non*, was tried at bar, it appears from the report of the case, that the subscribing witnesses to the will and codicil, who swore that the testator was utterly incapable of making a will, were called by the defendant in the issue, and not by the plaintiff; for the reporter says, "to encounter this evidence, the plaintiff's counsel examined the friends of the testator, who strongly deposed to his sanity;" and, again, the Chief Justice expressed his opinion to be, that all the defendant's witnesses were grossly and corruptly perjured. And after the trial of this issue the will was established. In such a case, to have compelled the devisee to call these witnesses, would have been to smother the investigation of the truth.

Now, in the present case, the application to this court is not by the devisee seeking to establish the will, but by the heir at law, calling upon this court to declare the will void and to have the same delivered up. The heir at law does not seek to try his title by an ejectment, and apply to this court to direct that no mortgage or outstanding terms shall be set up against him to prevent his title from being tried at law, but seeks to have a

(a) 1 Ves. sen. 178.

(c) 1 Mer. 193; Cooper, 136.

(b) 1 Wils. 216.

(d) 1 W. Black. 365.

(e) So it appears by reference to the Registrar's book. Reg. Lib. B. 1761, fol. 130.

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decree in his favor, in substance and effect to set aside the will. This case, therefore, stands upon a ground directly opposed to that upon which the cases above \*referred to [\*15] rest. So far from the heir at law being bound by a decree which the devisee seeks to obtain, it is he who seeks to bind the devisee, and such is the form of his application, that if he fails upon this issue, he would not be bound himself. For the only result of a verdict in favor of the will would be, that the heir at law would obtain no decree, and his bill would be dismissed, still leaving him open to his remedies at law. No decided case has been cited, in which the rule has been held to apply to such a proceeding; and, certainly, neither reason nor good sense demands that this court should establish such a precedent under the circumstances of this case. If the object of the court, in directing an issue, is to inform its own conscience by sifting the truth to the bottom, that course should be adopted with respect to the witnesses, which, by experience, is found best adapted to the investigation of the truth. And that is not attained by any arbitrary rule, that such witnesses must be called by one, and such by the other party; but, by subjecting the witnesses to the examination in chief of that party, whose interest it is to call him, from the known or expected bearing of his testimony, and to compel him to undergo the cross-examination of the adverse party, against whom his evidence is expected to make.

In the present case, Mr. Procter and Mr. Edmund Tatham, two of the subscribing witnesses to the will, had been examined in this court, and their depositions were known to both parties. It was well known, that, if called by the devisee, they would state in effect "that the testator was, at the time of signing and publishing the will, of weak mind and deficient understanding, though of good memory; that he was of sufficient mind to make a plain and simple disposition of his property, but not an intricate will like the present."

\*The real question is, whether these witnesses are to [\*16]



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be believed upon this evidence in contradiction to their own solemn act in the attestation of the will and codicil. That is the problem to be solved. At the time they are put into the witness box, it is known their evidence is in favor of the heir at law, and entirely subversive of the will. What questions, then, can the devisee wish to put to them, other than such as call upon them to explain and account for their solemn attestation of these instruments? And those are questions which can arise upon cross-examination alone. He would wish to ask Mr. Procter what would induce him to attest the execution of the will in 1822, and the codicil in 1825, if such was his opinion of the intellect of the testator? Upon what ground he had been the attesting witness to two former wills which had been successively destroyed, and the depositary of the duplicates of each in succession, at the request of the testator, down to the hour of his death? Whether he had not lived in habits of intimacy with Mr. Marsden, and treated him always as a man of understanding and sense? Whether he had not, upon a former occasion, lent money to Mr. Marsden on his bond and received payment from him, thereby treating him as a man capable of binding himself, and of managing his own affairs? And similar questions would be proposed to Mr. Tatham. It is obvious that if the devisee should be compelled on the trial of this issue to make those witnesses his own, the effect would be to shut out instead of discovering the truth; for after the formal examination in chief to which alone they could be subjected, the heir at law would take care not to ask them a single question.

It is further to be observed, that in the present case there is the less necessity for calling all the subscribing witnesses [\*17] to the will, as no question arises upon the \*facts attending the execution of the will, or the compliance with the requisites of the Statute of Frauds. There is nothing peculiarly within the knowledge of these witnesses, nor any point to which they could be examined, which is not common to the other witnesses called to depose to the state of the testator's understanding. Upon the ground, therefore, that there is no rule in this court

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which calls upon the devisee to bring forward all the subscribing witnesses to the will, where the heir at law files the bill—as also upon the ground that, where the subscribing witnesses contradict the effect of their own attestation, it would not be unreasonable to dispense with the rule, even in cases where it is held to apply—it appears to us that no new trial should be granted on account of Mr. Procter and Mr. Edmund Tatham not having been examined by the devisees on the trial of this issue.

We must consider, therefore, the second and principal ground upon which this application has been rested, viz., that the verdict of the jury establishing the competency of Mr. Marsden to make this will, ought not to be satisfactory to this court; but that, upon the evidence disclosed at the trial, there is so much room to doubt the propriety of the verdict, that this court ought to submit the question to the investigation of a second jury.

The grounds upon which the validity of the will was contested at the trial, and which have been since relied upon in argument before this court, seem principally two; first, the general incompetency of Mr. Marsden to make any testamentary disposition of his property, or, at all events, such a will as the present; and, second, that if Mr. Marsden was not altogether incapable to devise, yet he was of so weak and imbecile a mind as \*to make him easily subject to fraud and coercion, and that the present will was obtained from him under the effect of fraud or coercion exercised on him by Mr. Wright. [\*18]

The first of these grounds, it will be readily conceived, is that upon which the decision of this cause must mainly hinge. For, on the one hand, if the jury ought to have found upon the evidence the general incapacity of Mr. Marsden to make a devise, there would have been no need for any further inquiry as to fraud or coercion; on the other hand, if the jury have properly found the general competency or capacity of Mr. Marsden to devise, such a finding would limit the investigation of the second question to a very narrow point, viz., to the single inquiry, what

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degree of fraud or what degree of coercion was exercised by the plaintiff upon the mind of the testator? The question would in that case become this: assuming Mr. Marsden to have had generally sufficient understanding to enable him to dispose of his property by will, is there evidence of such fraud or such coercion by Mr. Wright, exercised upon the state of mind, such as it was, of Mr. Marsden, as to render the will in question, not the result of Mr. Marsden's free and uncontrolled agency, but in effect the will of Mr. Wright?

And upon this subordinate question, as to the fraud or coercion exercised upon Mr. Marsden, we think, if the general competency of Mr. Marsden to make a will has been properly established, there appears to be no sufficient evidence of actual fraud or coercion on the part of Mr. Wright, either in procuring this particular will and codicil to be made, or in the execution of the same, to call for a new trial, on this ground, as *contra-distinguished* from the other.

[\*19]     \*It was the general incapacity of Mr. Marsden to make a will which formed, as might be expected, the principal contention between the parties before the jury, and again upon the argument before this court on the application for a new trial: and whether that question has been properly decided by the jury, is the point which is now to be considered.

On the trial of this cause, for the purpose of proving affirmatively the general incapacity of Mr. Marsden, a very large body of parol evidence was produced by the defendant in the issue, comprising not fewer than sixty-one witnesses in number; some of whom deposed to the state of Mr. Marsden's intellect and the powers of his mind in very early life, and others continued the account down to a period very shortly before his death in 1826. And if this evidence had been uncontradicted by testimony of a similar nature, and applying itself to the same points on the part of the plaintiffs, the fair result of the defendant's proof may be taken to have been this—that Mr. Marsden, from his earliest to

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his latest years, was a very weak and imbecile man, of singular and capricious habits; that he was by nature extremely timid, and the prey of idle and unmanly fears; that he lived, in particular, in the habitual dread of Mr. Wright, who had obtained a complete dominion over him, and to whom he paid, on all occasions, the strictest and readiest obedience; that his understanding and judgment were far below those of the generality of men, indeed, not exceeding the level of children; and that according to the language of some of the defendant's witnesses, "he was utterly incapable of managing and conducting his own affairs, and of giving instructions for such a will as that in question, even divested of its technicalities." Such evidence as this, had it not been met by proof of a contrary description, it is unnecessary to say, would \*have been decisive of the [\*20] question of incapacity. But, on the part of the plaintiffs, a body of witnesses were produced, large in point of number, though not so numerous as those on the part of the defendant, and whose general testimony is of a nature not only conflicting, but utterly irreconcilable with the proof on the part of the defendant. According to them, Mr. Marsden, the testator, was a man of very retentive memory, and although not of strong mind or of natural talent equal to the generality of men, yet of such understanding and judgment as to be competent to conduct all the ordinary transactions of life; and with reference to the immediate question under investigation, in the language of some of those witnesses, "a man perfectly competent to manage his affairs with the assistance of agents and professional men, and to make such a will and codicil as these in question."

Where the question of competency is to be resolved on testimony so adverse and repugnant as the present (and such repugnance does not consist so much in a contradictory account of single facts, as in the general narrative of transactions extending through the space of a long life), it is useless to argue on each particular fact brought forward on either side, or on the testimony given by each particular witness. The only inference that can be safely drawn, is that which arises from the general effect

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and tendency of the whole body of proof on each side of the question. The inquiry becomes this—whether the general mass of evidence tending to establish the weakness and imbecility of the testator's mind, or that which tends to establish his competency, such evidence on each side extending through his long life, is entitled to the preference? And in solving such a question, it must be admitted that, even in this view of the [\*21] case, it would be extremely difficult to draw a \*conclusion, from parol evidence so contradictory and conflicting as that in the present case, upon which reliance could be placed with perfect safety. If, however, it were absolutely necessary to decide this question on the judgment and opinion of the witnesses examined on each side as to the capacity of the testator, much would depend on the situation in life and the character of the respective witnesses, on the opportunities they respectively had to form any judgment upon the testator's understanding, and their ability to form a correct judgment; upon the degree of intimacy between the respective witnesses and the testator, the nature of their intercourse, and their habits of life together; upon the period during which their acquaintance continued, and, above all, the comparative closeness with which it is brought down to the time of making the will and codicil; in all which several particulars, if the evidence which has been given on each side should be weighed and balanced together, it is sufficient at present to observe, that there was a greater power and better opportunities of forming a correct judgment as to the testator's capacity on the part of the witnesses called by the plaintiff, than of those called on the other side.

But it appears to us to be unnecessary, on the present occasion, to have recourse to a mode of investigation so difficult. For where the question is left in doubt upon the parol testimony, and the facts of the case will warrant it, it is the safer course to try the question by the evidence of collateral facts which are not involved in the contradiction raised by the parol evidence. Such an appeal, at the same time, resolves directly the question at issue between the parties, and also determines incidentally to

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which class of witnesses, where they are repugnant and contradictory, the preference is to be given. Such was the rule applied by Lord Redesdale in \*the case of *Towart v. Sellers*,<sup>(a)</sup> and it is obviously a rule founded on sound reason and common sense.

Now, in the present case, it appears to us there are three distinct classes of evidence, which stand clear of the conflicting parol testimony relating to the competency of the testator, the consideration of which, if the facts are established by satisfactory proof, as they appear to us to be, lead directly to the conclusion that the verdict which has been found by the jury is the right verdict. Those heads of evidence are the correspondence between Mr. Marsden and his friends; the various acts done by him in relation to the disposition of his property; and the circumstances attending the preparation and execution of the will itself.

The correspondence of the testator, given in evidence at the trial, consists: first, of letters passing between him and Mr. Greene, who was acting as his solicitor, principally in conducting the purchase of a large property, and the raising money for that purpose, and extending from the year 1787, at different intervals, down to 1804; second, of letters passing between Mr. Wright and the testator, upon business and other subjects, in the interval between 1791 and 1814; third, of letters between Mr. Dawson and the testator, being principally letters on the ordinary topics occurring between friends from 1811 to 1819; fourth, of letters between Mr. Alexander Marsden and the testator from 1811 to 1820, showing the commencement and progress of the acquaintance between those two gentlemen; and, lastly, of two single letters, one in 1797, from Mr. Bickersteth, the surgeon of Mr. Marsden, to that gentleman, containing a request to him to qualify as a commissioner \*under a road trust, [\*23] and to give his vote for a Mr. Dobson, a request which

(a) 5 Dow, 231.

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was afterwards complied with ; the other a letter in 1800 to Mr. Baldwin on the subject of the prosecution of some offenders against the game laws.

The importance of this long and varied correspondence in deciding on the competency of the testator to make his will, is self evident. If it be the genuine correspondence of Mr. Marsden, no one could hesitate to declare, that the man who possessed sufficient vigor and energy of mind to carry on this correspondence, must be held to possess a disposing power over his own property. It was, indeed, so felt by the counsel for the defendant, who admitted what indeed could not be denied, that if these letters were the genuine letters of the testator, and the acts done by Mr. Marsden as to the disposal of his property were his own acts, there was an end of all question about the will. It is, however, suggested that the letters were written under the tutelage of Mr. Wright or some other person ; that they were in reality Wright's letters, and not those of Mr. Marsden ; and that the very circumstance of copies being found in Marsden's handwriting of all the letters, both trifling and important, which he wrote to his different correspondents, showed at once the authority of Wright over Marsden, and afforded proof of a deep laid plan on his part, to prepare evidence against the time it should be wanted in support of the validity of any act done by Mr. Marsden in the disposal of his property.

In order, therefore, to ascertain the weight due to these letters, the first question is, whether they are open to the objection above suggested.

[\*24] \*The single circumstance of copies having been made by Mr. Marsden of all the letters written by himself, and such copies having been carefully preserved by him, indorsed in his own handwriting, is surely too slender a ground for justifying the conclusion that the letters were written under the control of Mr. Wright. Admitting him to be a man of indolent habits, and averse to business in general, the preserving copies

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of the letters written by himself, is quite as consistent with the supposition that a man with little general occupation, the master of his own time, should have made these copies for his own amusement, or for his future recollection, as with the inference that they were made by the contrivance of Wright.

The first observation, therefore, which arises upon these letters, is the absence of any direct proof that Mr. Wright, or any person on his behalf, was concerned in the fabrication of these letters. During so long and so varied a correspondence, if the fact had been so, it might surely have been expected that some evidence would have been furnished of interference on the part of Mr. Wright, either by direct testimony of the fact, or indirectly from the conversations of Mr. Marsden. But there is no evidence to this point, of sufficient weight or preciseness, to justify any inference of this nature.

In the next place it is to be observed, that as to all the letters written to Mr. Wright, they must necessarily have been written in his absence, when the writer must have been free from his personal inspection and control. Some were written from Buxton to Mr. Wright when at Wennington Hall: some from Wennington Hall to Mr. Wright when in London; others during Mr. Marsden's absence from home at Belle Hill. In \*none of these letters is there any proof of that degree of [\*25] incapacity which is imputed to the testator. Mr. Wright could neither have dictated the answers, nor compelled Mr. Marsden to keep copies of them. And there is no evidence in the case beyond mere surmise, that, in the absence of Mr. Wright, Mr. Marsden was acting under the control of any other person placed in his stead. With one of the letters Mr. Wright sends him some deeds of exchange, which he directs him to execute in the presence of Mr. Carr of Settle; and he answers in his letter that he has so executed them, as the fact appears to be. Fraud, control or interference is not to be presumed, but, like any other fact, is to be proved by direct testimony; and there is none such as to these letters written to Mr. Wright.



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But, in the third place, there is not one of the correspondents of Mr. Marsden who was not personally well acquainted with him, either before the correspondence commenced or before it was brought to a close. Mr. Greene knew him well, both before and throughout the whole correspondence. Mr. Dawson knew him before the first letter was written, and visited him with his family, in the course of the correspondence. Mr. Alexander Marsden, after the correspondence had commenced, visits him, with his daughter, at Hornby Castle. Mr. Bickersteth and Mr. Baldwin knew him well before their letters were written. All these persons, therefore, were acquainted with the reach and capacity of his mind. But, with this knowledge of the person and character of Mr. Marsden, how can we suppose that the several correspondents could be themselves so far deceived, as to believe letters which were really written by Mr. Wright, to have been the productions of Mr. Marsden? We think it, therefore, the safer inference to draw, that these letters, which were considered by his [\*26] \*correspondents, who knew the extent of his capacity, to be his genuine letters, really were so, than, in the absence of any direct testimony, and under the difficulties which would surround such a supposition, to consider them to be letters either composed by Wright, or written under his immediate control.

The next class of collateral evidence, is that which comprises acts done by Mr. Marsden, relating to the disposal of his own property. Twenty-three deeds were proved to have been executed by Mr. Marsden, in the interval between 1782 and 1819, being various dispositions affecting his real estate. Of these, one was a mortgage to the large amount of 27,000*l*. The charges upon the property of Mr. Marsden, were in many instances executed in favor of persons in the immediate neighborhood, to whom Mr. Marsden was well known; amongst the rest, one was a mortgage in 1804 to Mr. Edward Tatham, one of the witnesses to his will and codicil. Two of the deeds, above referred to, were transfers of mortgages to the amount of 15,000*l*., and were executed by Mr. Marsden subsequently to the date of the will. Thirty-five different deeds were produced, which had been exe-

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cuted by other parties to Mr. Marsden, between 1790 and 1824, and conveying property to him. Twenty-one bonds were given in evidence, all executed by Mr. Marsden, to various obligees, being securities to the amount of 16,000*l.* and upwards, between the years 1781 and 1814, all of which had been since paid off, and were then in the hands of his personal representative. Of these bonds, one in 1783 for 400*l.* was given to Mr. Postlethwaite, an attorney at Lancaster, who had been agent to Mr. Marsden; another for 6,000*l.*, in 1806, to Mr. Houseman, a gentleman in his immediate neighborhood, who had lived much with him, and on terms of great intimacy. One for 400*l.*, \*in [\*27] 1814, was given to Mr. Procter the curate of Hornby, being one other of the witnesses to the will of the testator.

These various acts involve dealings with the testator, by numerous persons, in which a mistake as to his capacity or competency would have been hazardous, and not improbably fatal, to the interests of the contracting parties. They are executed at intervals through a great extent of time, and relate to property of very large amount. The deeds of conveyance, both to and from Mr. Marsden, appear, almost without exception, to have been prepared by attorneys, to whom Mr. Marsden was proved to have been well known, or who were attorneys residing in his immediate neighborhood. They were attested for the most part by attorneys living in the neighborhood of Hornby Castle; and so far as appears on the evidence, both the attorneys who prepared the deeds, and the witnesses to them, were men of unimpeachable credit. If Mr. Marsden was really a person in the weak and imbecile state described by the witnesses on the part of the defendant, or if he had been the mere tool or dupe of Mr. Wright, it is very difficult to conceive that such a state of incapacity should be unknown to them, when the mere execution of the deeds before them, would, of itself, have given the opportunity of ascertaining his want of competency. And no reasonable supposition can be framed, that, with the knowledge of such, his incapacity to transact business, they could have consented to attest the execution of deeds either to or by him, and thus make

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shipwreck of their own character and of the interest of their clients, without any visible equivalent. We cannot think the testimony of persons who have merely conversed with him, or met him at table, or on other occasions, and who pronounced him to be incapable, is for a moment to be \*put in competition with the testimony of persons who have *dealt with* him, and by thus risking their own interests, furnish undeniable proof of their belief, and the sincerity of their belief, in his competency.

We come now to the third and last ground on which our opinion that there is no necessity for a new trial in this case has been formed, viz.: the circumstances under which the will and codicil were prepared and executed. Mr. Bleasdale, the gentleman who was called in as the attorney to make the will, was a person who had retired from the profession of the law, in which he had practiced long, and had acquired great experience. He was a person who had known Mr. Marsden when at school, and had kept up a constant acquaintance with him, which had increased with their age. He had lived since the year 1816 in Mr. Marsden's neighborhood, and, for some years before his death, had been accustomed to visit him at Hornby Castle for ten days or a fortnight at a time. He had been first applied to after the death of Mr. Marsden's former attorney, Mr. James Barrow, to make his will anew (a proof that Mr. Marsden had not been deemed incapable to make a will by a former attorney), and had made for him three several wills before that which is now in dispute; the testator always cancelling his former will, when he made a new one. To the two first wills, Mr. Bleasdale himself, Mr. Bickersteth, the surgeon of Mr. Marsden, and the clergyman of Hornby, were the witnesses. To the third will the witnesses were the same as those who have subscribed the will and the codicil which are the subject of this suit.

Mr. *Bleasdale* received his instructions on all occasions from Mr. Marsden himself, and from no other person; at first [\*29] receiving verbal instructions, and afterwards \*written instructions for a codicil, in the handwriting of Mr. Mars-

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den, and a note in his handwriting also, relating to the will itself (which were given in evidence), in pursuance of which instructions Mr. Bleasdale prepared the will. He stated upon his examination, that, on each occasion when he prepared the will, Mr. Marsden explained his intentions and object in a way he could not mistake, and that he framed the will accordingly. He stated further, that he has no doubt Mr. Marsden was fully competent to understand the will and codicil now in dispute.

Supposing, therefore, the testimony of Mr. Bleasdale to have been founded in truth, there is an end of the question. Mr. Bleasdale was a man of skill and experience; he had a thorough knowledge of the testator's capacity. There is no room, therefore, for mistake on his part. If the will prepared by him is not the will of Mr. Marsden, it must be the result of fraud and conspiracy between him and Mr. Wright. Mr. Bleasdale was open to cross-examination, and nothing was produced by it tending to impeach his testimony beyond this, that he was living on terms of intimacy and friendship with Mr. Wright and his family. But fraud and conspiracy, in this case, as in every other, must be proved: it is not enough to surmise or to suspect it; and looking at the testimony relating to the preparation of this will and codicil and the execution of them, we see no proof whatever of any indirect motive or any misconduct on the part of Mr. Bleasdale.

Without, therefore, entering upon an accurate calculation of the relative value of the parol evidence, as to the question of the competency of the testator, and looking only to the effect of Mr. Marsden's correspondence \*with his friends, [\*30] to his dealings and transactions with other men in the disposition of his property, and to the circumstances attending the preparation and execution of the will and codicil, we see no reason for submitting this issue to a second trial. The cause was tried before a special jury, who appear to have shown great patience and attention in the discharge of their duty. The whole of the evidence was summed up to them by the learned Judge, and we think the question was properly left to them in the shape

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in which he proposed it, as a general question of the capacity of the testator to dispose of his property by will.

Upon the whole, for the reasons above given, we think the verdict which has been found by the jury ought to be satisfactory to this court.

THE LORD CHANCELLOR:—Their Lordships have been kind enough to assist me on this occasion, in consequence of my having not only acted as counsel for the plaintiff on the trial of the issues, but having also argued the question at the Rolls on the application for a new trial.

Upon the first branch of the argument, my mind entirely goes along with the opinion delivered by my Lord Chief Justice—that, as well on the authorities as on principle, that ground of appeal altogether fails. There is a broad line of distinction between cases where the moving party seeks to set the will aside, and cases where the moving party is a devisee seeking to establish it: the rule which makes it imperative to call all the witnesses to a will, must be considered as applicable to the latter only.

[\*31]     \*With respect to the merits, I did not think I could come to any conclusion with so much impartiality as, however it might satisfy myself, would be satisfactory to the parties; and by their consent, therefore, the consideration and decision of that part of the case—of the question whether the verdict was right or wrong, and if wrong, whether it was so wrong as to require or justify a new trial—has been left solely in their Lordships' hands. The judgment in point of form is mine, but in substance and effect, it is the judgment of their Lordships: and I neither agree nor differ with them, as I have carefully abstained from forming any opinion on the subject.

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ROLLS:—1831: 25th November.

Where a bill is filed to set aside a will, and, upon an issue directed by the court, the verdict of the jury is in favor of the will, and a new trial is refused, the bill will be dismissed without costs, unless the validity of the will could have been tried by ejectment.

This cause now came on for further directions, and a question was made as to the costs of the suit.

For the defendant it was argued, that the bill ought to be dismissed with costs. Not satisfied with alleging that the testator was not of sound and disposing mind, it brought forward a pretended case of gross fraud and undue influence, most injurious to the character of the defendant Wright; every part of that case had failed: and it had been established by the verdict of a jury, approved of by the Judge before whom the issue was tried, and ratified by two judgments of this court, that the will, which the plaintiff sought to impeach, was the deliberate and valid act of a testator of sound and disposing mind. Under such circumstances the plaintiff ought to pay the costs both of the suit and of the issue. This was the more reasonable, as there was nothing to have prevented him from bringing an ejectment, and consequently it was not necessary for him to come into equity, in order to be enabled to try his title. It was, indeed, admitted in the answers, that the legal estate in part of the property \*was outstanding in mortgagees: but there was no ad- [\*32] mission that the legal estate in the whole of the property was outstanding. In fact, the legal estate in many of the lands was in the testator at the time of his death; and the plaintiff could have brought ejectment to recover possession of these.

\* On the other hand, it was insisted that the evidence in the cause and on the issue showed that the heir had not instituted the suit vexatiously, or introduced into his bill allegations which were not essential to the investigation of the case. How could it be suggested that he had proceeded without justifiable grounds, when even the costs of the appeal on the motion for a new trial were not given against him? It was impossible that he could

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have tried his title with any safety by an ejectment; for he might have been defeated in twenty successive ejectments, by a defence setting up outstanding legal estates. It was admitted that the legal estate in the greater part of the property was in mortgagees: and if there were some lands, of which the testator had the legal fee in him at the time of his death, what means had the heir of distinguishing these lands from others, the legal fee of which was in third persons?

THE MASTER OF THE ROLLS stated, that it not being clear, by reason of the alleged mortgages, that the plaintiff, the heir, could have proceeded by ejectment, and the nature of the case making it reasonable that the heir at law should have full opportunity to investigate the circumstances under which the will was made, he could not consider the suit vexatious; and he therefore dismissed the bill without costs. But the plaintiff was ordered to pay the costs of the issue.(a)

[\*33]

\* DURANT v. MOORE.

1830: 8th, 10th and 15th November.

An order that a defendant in contempt for breach of an injunction, shall stand committed, unless cause be shown on a stated day, is not irregular if it be personally served.

THE defendant having, in breach of an injunction, removed part of the crops off the lands in his occupation, the plaintiff obtained and served him with an order that he should stand committed for the contempt, unless cause were shown to the contrary on the first seal before *Michaelmas* term.

The *Solicitor-General* (Sir *E. Sugden*) and Mr. *Wakefield* now moved that the order for the defendant's commitment might be

(a) *Scaife v. Scaife*, 4 Russ. 309.

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made absolute. It was the strictly regular course that the order should be taken *nisi* in the first instance. The course was followed in *Rudge v. Hughes*,<sup>(a)</sup> where the defendant, after being personally served with the injunction, had proceeded to cut down fruit trees and commit wanton waste in a garden.

Mr. *Horne*, for the defendant, submitted that the proceedings were irregular. According to the established practice, the motion should have been made upon notice, that the defendant might at once be committed absolutely; and upon the discussion of that application, all the circumstances would have been fully brought forward by affidavit. The rule was finally settled in *Angerstein v. Hunt*,<sup>(b)</sup> and had never been departed from since. In the unreported case referred to, it appears from the registrar's book<sup>(c)</sup> that the defendant, who had been committed under an order *nisi* \*subsequently made absolute, [\*34] was shortly afterwards set at liberty on the application of the plaintiff himself, who submitted to pay the costs of the proceedings, a circumstance which afforded a fair presumption that those proceedings were considered quite irregular.

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*Nov. 15th.*—THE LORD CHANCELLOR (Lord *Lyndhurst*):—The only question to be considered is, whether or not the order *nisi* is a regular course of proceeding when a party has been guilty of a breach of an injunction. It is laid down in the case of *Angerstein v. Hunt* that the order should be for the committal *instante*, and that there should be no order *nisi* in the first instance. With respect to the authority of *Rudge v. Hughes*, referred to by Mr. Wakefield, although the facts of that case do not very distinctly appear from the statement in the registrar's book, Lord Eldon took time to consider the point. The party was commit-

(a) 31st October, 1818, Reg. Lib. B. fol. 1782.

(b) 6 Ves. 438.

(c) 25th January, 1819, Reg. Lib. B. fol. 266.



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ted under an order *nisi*, and after remaining three months in custody he was liberated at the instance of the plaintiff, who, believing the defendant to have been really innocent in intention, himself agreed to pay the costs. This, therefore, was a case of compassion, to which the plaintiff probably was the more inclined from the circumstance of the defendant being eighty years of age. Upon principle, I think that the order to show cause does not in any way prejudice a defendant; for as he must be personally served if he has merits, he may, on showing cause, be dismissed. Such an order is not more hard than an order for an immediate committal. On the contrary, it is less so; for it gives the defendant longer time to consider and answer the affidavits made against him by the plaintiff. Upon principle, I think that an order to show cause why a party should not be committed for breach of an injunction may be served personally; and for this I consider the case of *Rudge v. Hughes* to be a conclusive authority. These proceedings, therefore, have been quite regular.

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## ALEXANDER v. THE DUKE OF WELLINGTON.

ROLLS.—1830: 15th and 16th November. L. C.—1831: 26th and 27th May.

Military prize, when captured, is capable of being effectually assigned by the captor, before any interest in it has been vested in him by a grant from the crown.

A warrant of the crown, conveying military prize to trustees upon trust, to collect, recover and receive the same, and directing the trustees, as soon as the case would admit, to prepare a scheme for the distribution thereof, conformably to certain principles therein stated, and to submit such scheme to the Lords of the Treasury, for the signification of the royal pleasure thereon, is not an absolute or final grant: it creates no vested interest in any particular individuals, as objects of the bounty; nor can persons claiming to be *cestui que trusts* compel a distribution under it by a suit in equity against the trustees.

*Semble*, the crown may, at any time before distribution, alter or revoke a grant of military prize.

IN the year 1817, the late Marquis of Hastings, who was then Governor-General of India, and who also held the appointment

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of commander in chief of all the forces in the East Indies, as well those of his Majesty, as those of the East India Company, commenced hostilities against the Pindarrees, and against several of the Mahratta princes, who were threatening an attack on the British territories. With a view to the vigorous prosecution of the campaign, and in order more effectually to co-operate with the rest of the troops engaged in the same service, his Lordship took the field in person at the head of a large force belonging to the presidency of Bengal, and known by the name of the grand army; but the chief burden of active war fell upon the forces which were posted in the near vicinity of the hostile states. The forces assembled in that quarter consisted, partly of what formed properly the Deccan division, commanded by Lieutenant-General Sir Thomas \*Hislop, and partly of brigades and [\*36] detachments from other divisions and belonging to different presidencies. The whole bore the general appellation of the army of the Deccan, and acted under the orders of Sir T. Hislop, in virtue of an appointment as its commander in chief. In the following year hostilities terminated in the total defeat and subjugation of the native powers, and a very large quantity of valuable booty, consisting chiefly of stores and treasure, fell into the hands of the conquerors as the fruits of their success. Portions of this booty were acquired by the enterprise of small detachments, who, acting independently of the main army, attacked and plundered individual forts, in some instances after the camp had been broken up and open warfare had ceased. Another and much larger portion was captured by the troops composing the Deccan army, by whom the active operations of the war were principally carried on: but the whole of it, from whatever sources derived, and by whatever parties won, was ultimately thrown, under the general denomination of the Deccan prize, into one common fund, which, being prize taken in war, was admitted to have vested in the crown by force of the prerogative, and to be disposable, therefore, according to the pleasure of his Majesty.

On the 10th of October, 1820, and on the 1st December, 1822, long before any distribution of the booty had taken place, and

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before even the principles on which a distribution should be regulated had been declared, the Marquis of Hastings, who still continued to fill the offices of Governor-General and commander in chief of the forces in India, executed and gave to Messrs. Alexander & Co., bankers in Calcutta, two several indentures, whereby, in consideration of certain advances made to him, and to secure the repayment thereof, he assigned to Alexander & Co. all his expectant share \*and interest in the Deccan prize money, whatever it might be.

In the mean time it became understood; that in the exercise of the royal bounty, the Deccan prize would be distributed, as had been usual in similar cases, among the officers and men who had been concerned in its acquisition; and his Majesty having referred it to the Lords Commissioners of the Treasury to consider and report upon the mode in which a distribution might be most equitably made, memorials were presented to their Lordships on behalf of the East India Company, Lord Hastings, Sir T. Hislop, and others, bringing forward the respective claims of the memorialists upon particular portions of the fund.

The result of their Lordships' deliberations was communicated to his Majesty in the form of a treasury minute, which bore date the 5th of February, 1823, and of which the following is the material part:

“My Lords, having heard counsel in support of the claims of the Marquis of Hastings and the grand army, and of those of Sir Thomas Hislop and the army of the Deccan, and having maturely and deliberately weighed and considered all the documentary evidence laid before them in behalf of the several parties, and the arguments of the counsel, are of opinion that the most just and equitable principle of distribution will be to adhere, as nearly as the circumstances of the case will admit, to that of actual capture, and although they are aware that the principle of constructive capture must, under certain circumstances in a degree be admitted, the disposition should be to limit rather than to extend that principle. They are, therefore, of opinion, that

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the mode of distribution originally intended by the Marquis \*of Hastings, would be most equitable and just with [\*38] respect to the booty taken at Poonah, Mahidpore, and Nagpore, and that the booty taken on each of these occasions respectively, should belong to the divisions of the Deccan army engaged in the respective operations in which the same was captured: but, that as the division of the Bengal army, under Brigadier-General Hardyman, appears to have been put in motion for the purpose of co-operation directly in the reduction of Nagpore, and to have been actually engaged with a corps of the enemy antecedent to the surrender of that place, this division appears to my Lords to be justly entitled to share in the booty captured at Nagpore; and that such other booty arising from the operations against the Mahrattas in the years 1817, and 1818, as may now be subject to his Majesty's royal disposition, should be granted to such divisions of the grand army, under the command of the Marquis of Hastings, and of the Deccan army under the command of Sir Thomas Hislop, as may respectively have captured the same. My Lords are also of opinion, that conformably to the letter of the Marquis of Hastings to Sir Thomas Hislop of the 12th of January, 1818, Sir Thomas Hislop, as commander in chief of the Deccan army, and all the officers of the general staff of that army, are entitled to participate in the booty which may arise from any capture by any divisions of the army of the Deccan, until the said army of the Deccan was broken up on the 31st of March, 1818. My Lords have felt it to be inconsistent with their duty, to recommend to his Majesty to give his sanction to any agreement for the common division of booty, into which the several divisions of either army may have entered, as it is their decided opinion, that if the principle of actual capture be not adopted in this case, as the rule of distribution, no other correct or equitable rule could have been adopted than that of a general distribution among the forces of all the \*presidencies engaged in the combined [\*39] operations of the campaign. My Lords do not consider, that under all the circumstances of the case, it will be expedient to recommend to his Majesty to grant any part of the booty to

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the East India Company; and my Lords will submit to his Majesty their recommendation, that he will be graciously pleased to direct that his royal grant of the said booty may be made in conformity with these principles; and for the purpose of better carrying into effect his Majesty's gracious intention in this behalf, my Lords will recommend to his Majesty, that a grant be made of the said booty to trustees, to be appointed by his Majesty, for the purpose of ascertaining and collecting the said booty, and for preparing a scheme for the distribution thereof, conformably to the principles above stated, which my Lords will submit for his Majesty's final approbation and sanction under his royal sign manual warrant."

This minute was on the 22d of March, 1823, followed by a royal warrant under the sign manual, which, after reciting the circumstances under which the booty had been acquired and had become vested in the crown, set forth the treasury minute at large, and continued in these terms: "and whereas we have been graciously pleased to approve of the said minute and recommendation of our said commissioners: and whereas it is expedient that a warrant under our royal sign manual should be issued for granting the said booty to trustees to be appointed by us, for the purpose of ascertaining, collecting, and receiving the same, and for preparing a scheme of the distribution thereof, conformably to the principles recommended in the said minute: We, taking the premises into our royal consideration, are graciously pleased to give and grant, and do, by these

[\*40] \*presents, give and grant," &c. The warrant then proceeded to grant to the Duke of Wellington and Mr. Arbuthnot all the property of which the booty was composed, "in trust for the purpose of collecting, recovering, and receiving all the said booty, or the proceeds or value thereof, hereby granted from the said United Company, their officers or servants, and all and every other person or persons whomsoever, unto, or in whose hands, custody or power, the same or any part thereof, may have come, or may now be and remain;" and after investing the trustees with all the powers necessary for the due execu-

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tion of their office, it continued in these words: "And when, and so soon as the case will admit, we do authorize and direct our said trustees to prepare a scheme for the distribution of the said booty, and of all and every part or parts thereof, conformably to the principles recommended in the said minute of the commissioners of our treasury, and approved by us, which scheme shall be submitted by them to the said commissioners of our treasury, for the signification of our royal pleasure thereon."

When the trustees came afterwards to frame their scheme upon the basis of this warrant, difficulties were experienced in practically applying the principles laid down for their guidance, to the actual state of circumstances before them, and considerable delay took place in consequence. Eventually they addressed a letter to the Lords of the Treasury, stating to their Lordships the various respects in which those principles were, in their opinion, incorrect and inapplicable; and a second minute, founded, in a great measure, on the views taken in the letter of the trustees, was shortly after drawn up and issued from the treasury. It bore date the 16th of January, 1826, and was in these terms:

\*"My Lords, assisted by the trustees of the Deccan [\*41] booty, by Lord Bexley, and the law officers of the crown, having heard counsel on behalf of the Marquis of Hastings and the grand army, and also on behalf of Sir Thomas Hilsop and the army of the Deccan, upon the subjects of discussion relating to the distribution of the Deccan booty, which have arisen out of the difference between the actual circumstances attending the capture of a large proportion of that booty, as stated by the trustees, and those which were assumed at the hearing before their Lordships in January, 1823, and having maturely considered the arguments severally stated by the counsel, and also the whole of the documents upon the subject of this booty now before the board, are of opinion:

"First. That with respect to all that portion of the booty now at the disposal of the crown, which is described as having been

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'taken in the daily operations of the troops,' the distribution thereof should be made to the actual captors, according to the terms and conditions of the minute of this board of the 5th of February, 1823, and of the warrant of his Majesty of the 22d of March following.

"Second. That with respect to that part of the booty which consists of the produce of arrears of tribute, rent or money due to the Peishwah, it appears to my Lords to have been acquired by the general result of the war, and not by the operations of any particular army or division, and they are of opinion that it ought, therefore, to be distributed in conformity with the alternative stated in their minute of the 5th of February, 1823, as being 'the only correct or equitable rule, if the principle of actual capture cannot be adopted,' viz., amongst the forces of all the presidencies engaged in the combined operations of the campaign.

[\*42] \*"Third. With respect to the property captured at Nassuck, my Lords are of opinion that the booty recovered at that place cannot be distributed upon the principle of actual capture, and ought, therefore, to be divided amongst the forces of all the presidencies engaged in the combined operations of the campaign.

"Fourth. With respect to the booty recovered at Poonah, alleged to have been removed thither from the Rai Ghur, my Lords are of opinion that this booty cannot be distributed upon the principle of actual capture, to the force by which Rai Ghur was taken under the orders of the government of Bombay, unless it can be proved by the captors of Rai Ghur, that the property in question was actually in that fort at the time when it was taken, in default of which proof my Lords are of opinion that this booty also ought to be distributed among the forces of all the presidencies engaged in the combined operations of the campaign.

"Fifth. With respect to that portion of the booty which is stated to consist of money recovered on account of deposits made

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by the Peishwah, my Lords are of opinion that any part of this property which can be proved to have been in Poonah at the time when that place was captured, viz., on the 17th of November, 1817, ought to be distributed to the captors of Poonah according to the terms of the minute of the 5th of February, 1823, upon the principle of actual capture; but that with respect to those parts of the above property as to which such proof cannot be established, such moneys or effects must be considered as having been acquired by the general result of the war, and as such ought to be distributed amongst the forces of all the presidencies engaged in the combined operations of the campaign.

\*"Sixth. With respect to the share of the commander [\*48] in chief in the distribution under the several heads above enumerated, my Lords are of opinion that the Marquis of Hastings ought to share as commander in chief in all those cases in which Sir Thomas Hislop is not entitled to share as such, under the terms of the minute of the 5th of February, 1823, wherein it is declared, 'That Sir Thomas Hislop, as commander in chief of the Deccan army, and all the officers of the general staff of that army, were entitled to participate in the booty which may arise from any capture by any of the divisions of the army of the Deccan, until the said army of the Deccan was broken up on the 31st of March, 1818.'

"My Lords are further of opinion, that the general rules of division hitherto adopted in the distribution of booty to the forces in India, among the several classes and ranks of the army, should be adhered to on the present occasion."

The minute of the 16th of January, 1826, was followed by a warrant under the sign manual, bearing date the 30th of September, 1826. This instrument stated, in its preamble, the warrant of March, 1823, and the consequential grant to the trustees, reciting that such grant was made "in trust, for the purpose of being distributed to the said forces according to a scheme directed by our said warrant, and submitted by the said trustees to the



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commissioners of our treasury, for the signification of our royal pleasure thereon." It then proceeded: "And whereas the said commissioners of our treasury have humbly submitted to us, for our gracious approval, a minute of their board, bearing date the 16th day of January, 1826, containing directions to the said trustees as to the principles on which they were to prepare [\*44] the \*scheme for the distribution of the said booty, of which further directions we have been graciously pleased to approve: and whereas the commissioners of our treasury have represented to us that they have maturely considered the schemes prepared in conformity to the said minute, submitted to them by the said trustees for the distribution of certain parts of the said booty, taken in the daily operations of the troops under the command of Lieutenant-General Sir T. Hislop at the following places; viz.," &c. Here the warrant specified the several places where the booty taken was to be considered as falling within that description, and stated the value of the whole at 21 lacs 58,168 rupees, as more particularly set forth in the annexed schemes to which it referred. It then proceeded: "And whereas we are graciously pleased to approve of the said schemes, we do hereby authorize and direct our said trustees to distribute the proceeds of the said 21 lacs 58,168 rupees accordingly."

The warrant for the distribution of those portions of the booty which were to be considered "as having been taken in the daily operations of the troops," and therefore distributable upon the principle of actual capture, was followed, on the 13th of February, 1828, by another warrant, relating exclusively to that part of the booty to which the principle of constructive capture was to be applied. This latter warrant referred to, and formally approved of, the treasury minute of January, 1826, in language precisely the same with that employed in the warrant of September, 1826, already set forth; and it continued in these words: "And whereas the commissioners of our treasury have represented to us that they have maturely considered the scheme prepared in conformity to the said minute, and submitted to them by the said trustees for distribution of a part of the said

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\*booty acquired by the general result of the war, by the [45] forces under the command of the late most noble the Marquis of Hastings, commander in chief of all our forces in India, amounting in all to 41 lacs 39,803 rupees, &c., as shown by the said scheme hereunto annexed, &c.; and whereas we are graciously pleased to approve of the said scheme, we do authorize and direct the said trustees to distribute the proceeds of the said 41 lacs 39,803 rupees accordingly."

The ostensible object of these two instruments was to give the royal sanction and approval to the schemes therein referred to, which were framed in conformity with the principles recommended in the treasury minute of January, 1826. Their practical operation, when taken in connection with those schemes, was to authorize a distribution of the booty, proceeding to a much greater extent upon the principle of constructive capture, than seemed to have been contemplated by the warrant of March, 1823. The result was extremely prejudicial to the interests of Sir T. Hislop and the Deccan army, who, under the language of the original warrant, considering themselves the actual captors of the great bulk of the property, had expected to share it exclusively among themselves; and it was proportionably favorable to Lord Hastings' and the grand army, who were thus let in to participate in a fund which the Deccan army had supposed to be peculiarly its own, and of which the share allotted to Sir T. Hislop became in consequence reduced from that of commander in chief to that of a subordinate officer only.

The Marquis of Hastings died in November, 1826, before any distribution of the prize had taken place; and the bill was filed by Messrs. Alexander & Co., for the purpose of establishing their title under the indentures \*of October, 1820, [46] and December, 1822, to the share accruing to the marquis' estate by virtue of the warrant of February, 1828.

The scheme issued in pursuance of that warrant, appeared in the London Gazette of the 11th of March, 1828, and was entitled

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"Grant to the combined army which served under the command of the late most noble Francis Marquis of Hastings, K.G., commander in chief of all the forces in India, engaged in the war against the Pindarrees and certain of the Mahratta states, in the years 1817 and 1818." This scheme had ascertained the value of the share allotted to the commander in chief of what was there denominated "the combined army" at the sum of 44,201*l.*, being one-eighth of the whole fund thereby apportioned among the officers and men who composed that army; and as the description of commander in chief was understood to apply to Lord Hastings, although his name was not mentioned in the body of the scheme, the sum so allotted was paid into court in the cause of *Watson v. Duke of Wellington*,<sup>(a)</sup> by the trustees of the Decan booty, and on the dismissal of that suit, was directed to be retained to abide the result of the present claim.

Sir T. Hislop, who denied the validity of Lord Hastings' title, and various incumbrancers who set up claims against the fund under instruments posterior in date to the assignments to Alexander & Co., were joined with the Marquis' personal representative as defendants to the bill.

Of the questions argued at the hearing, the most material were the two following: first, whether the \*share of the Marquis of Hastings would pass by the assignment executed by him, after the booty had been taken, but before the crown had made any grant of it, or issued any warrant under the sign manual, determining in what mode it should be distributed: second, whether the amount of the share of the Marquis of Hastings was to be considered as definitively fixed by the warrant of 1828, or whether it was still open to any party to claim to have it reduced, according to the principle of distribution alleged to be established by the warrant of 1823.

Mr. Pemberton, Mr. Kindersley and Mr. Fane for the plaintiffs.

(a) 1 Russ. & M. 602.

Captors have, from the time of capture, an inchoate right in effects captured as prize, which, though the title is not perfected till a grant is made by the crown, is a vested right and is capable of transmission by assignment or otherwise. In *Stevens v. Bagwell*,<sup>(a)</sup> Sir William Grant says: "though the property was not completely vested in the captors until condemnation, yet after condemnation it is by relation considered as theirs from the time of the capture. . . . . The intention of the crown in all cases of this kind, is to put what is, in strictness, matter of bounty, upon the footing of matter of right. The service performed is thought worthy of reward; and, though the party performing it died before payment, the claim of bounty from the crown is considered as transmissible to his representatives, in the same plight and condition as the claim for wages, or any other stipulated or legal remuneration of service. In such cases the crown never means to exercise any kind of judgment or selection, with regard to the persons to be ultimately benefited by the gift. The \*representatives, to whom the [\*48] crown gives, are those who legally sustain that character: but the gift is made in augmentation of the estate, not by way of personal bounty to them. They take subject to the same trusts upon which they would have taken wages or prize money, to which the party from whom they claim might have been legally entitled." There is no authority or principle on which it could be held, that the interest which the captor has in prize money, is not capable of assignment till the grant by the crown is completed.

The amount of the Marquis of Hastings' share is definitively fixed by the warrant and sch $\acute{e}$ me of 1828; and no court can now enter into the consideration of the question, whether a greater or less sum ought to have been allotted to him. As no proclamation has been issued regulating the distribution of such booty as might be taken in the war, the division could be only

(a) 15 Ves. 152.

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in such manner as his Majesty by his sign manual should direct.(a)

[\*49] \*Sir Charles Wetherell and Mr. Stuart, for Sir Thomas Hislop, contended, at great length, that the fund was bound by the warrant of 1823, which established the principle by which the distribution of the booty was to be made, and that the distribution directed by the warrant of 1828 was not in conformity to this principle.

Mr. Bickersteth and Mr. Griffith Richards, for the personal representative of the Marquis of Hastings.

The Marquis of Hastings had not, at the time when the security to Alexander & Co. was executed, such an interest in the booty, as was capable of assignment. In *Stevens v. Bagwell*, prize money is placed on the same footing as wages.(b) It is settled that neither the full pay nor the half pay of an officer can

(a) The 54 G. 3, c. 86, s. 2, provides, "That in all captures which shall be made by his Majesty's army, royal artillery, provincial, black, and all other troops in the pay of his Majesty, or belonging to his Majesty, but in the pay of the united company of merchants trading to the East Indies, whether in conjunct expeditions with his Majesty's navy, or otherwise, of any fortress or possession of his Majesty's enemies upon the land, or of any ship or vessel in any road, haven, river, or creek belonging to such fortress or possession, the commanders and other officers and soldiers acting on such expeditions, shall have such right and interest as his Majesty shall think fit, to order and direct, in all the arms, ammunition, stores of war, goods, merchandize, and treasure belonging to the State, or to any public trading company of such enemies, which shall be found in such fortress or possession; and also in all and every ship or vessel, with their arms, ammunition, tackle, apparel and furniture, and all the goods, merchandize and other effects on board the same, which shall be captured in any road, haven, river or creek, belonging to such fortress or possession, after final adjudication thereof, as lawful prize to his Majesty, in any of his Majesty's Courts of Admiralty or Vice-Admiralty, which shall be duly authorized to take cognizance of the same (which courts are hereby required to proceed therein to lawful adjudication), to be divided in such proportions, and according to such general rule of distribution for the army as shall be established by his Majesty, or in default thereof in such manner as his Majesty shall, under his sign manual, be pleased to direct." The 54 G. 3, ch. 86, has since been repealed by the 2 W. 4, c. 53, which amends and consolidates the laws relating to the payment of army prize money.

(b) *Collyer v. Fallon*, T. & R. 459.

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be assigned or pledged; *Berwick v. Read*, (a) *Flarty v. Odium*. (b) Considered as a remuneration for past services, prize money cannot be assigned; and if it is viewed as an excitement to future exertion, the same objection applies. The country has a right to require, that the officers and soldiers shall not place themselves in a situation, in which the motives, held out to them by the crown, shall be impaired in force. In the present case, there is a \*peculiar disability arising out of the situation [\*50] of the Marquis of Hastings as Governor-General. The man who was Governor-General and commander in chief, was necessarily the person who would be principally consulted by the crown as to the mode of distribution which should be adopted: and in the present instance, communications on this subject did take place between the Marquis of Hastings and the officers of the crown. He would be exposed to temptation not to discharge his duty in such communications, if he were permitted previously to subject his own share in the booty to the demands of others.

Mr. *Wray*, for the crown.

Mr. *Spence*, Mr. *J. Russell*, and Mr. *Wright*, for other parties.

Mr. *Pemberton*, in reply.

Prize money is not in the nature of full pay or half pay. A soldier cannot assign his pay, because his pay is received for the purpose of enabling him to discharge the duties which he is hired to perform, and the probable result of alienating his pay would be to deprive him of the means of performing his duties. Prize money, on the contrary, is an extraordinary bounty granted by the crown as a reward for services already performed. The services having been performed, it matters not how the reward is dealt with by the party entitled to receive it; and whether it is assigned before or after the nominal grant by the crown, must be altogether immaterial. Even considered as a stimulus to future

(a) 1 H. Black. 627.

(b) 3 T. R. 651.

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any subsequent act of his Majesty, and the warrants of 1826 and 1828, therefore, were altogether nullities.

If the right were admitted to have been fully vested in Sir T. Hislop, the jurisdiction of the court to adjudicate upon the warrant, followed of course. There was no rule which laid it down, that when a royal grant once created a title, the validity of that title, and consequently the construction of the instrument creating it, might not, like any other matter, become the subject of litigation in Westminster Hall. Here, independently of the ground of trust before referred to, the fund which formed the subject matter of the grant having been brought into the Court of Chancery, the question of title to the fund, and, of necessity, the construction of the warrant, became collaterally, but regularly, cognizable in the same court. *Stevens v. Bagwell*,<sup>(a)</sup>

The LORD CHANCELLOR:—From the magnitude of the stake involved in it, this appeal is entitled to be termed very important; and it is also extremely important in another view, from the deep interest which many most meritorious individuals must necessarily take in the result. But here its whole interest ends; for if, on the one hand, I never saw a more important case, so, on the other, I have never, in the course of my experience at the bar, seen one less incumbered with any kind of difficulty.

[\*54] \*I shall begin with stating principles touching the uncontested rights of the crown in matter of prize; principles which have a material influence over the whole question, but which, however they may have been admitted in point of form, have been altogether lost sight of in their application to the argument. That prize is clearly and distinctly the property of the crown, that the sovereign in this country, the executive government in all countries, in whom is vested the power of levying the forces of the state, and of making war and peace, is alone possessed of all property in prize, is a principle not to be

(a) 15 Ves. 139.

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disputed. It is equally incontestable that the crown possesses this property *pleno jure*, absolutely and wholly without control; that it may deal with it entirely at its pleasure; may keep it for its own use; may abandon or restore it to the enemy, or, finally, may distribute it in whole or in part among the persons instrumental in its capture, making that distribution according to whatever scheme, and under whatever regulations and conditions it sees fit. It is equally clear, and it follows from the two former propositions, that the title of a party claiming prize, must needs, in all cases, be the act of the crown, by which the royal pleasure to grant the prize shall have been signified to the subject. Whether, where that act has once been completed, and it distinctly appears that the crown was minded to depart with the property finally and irrevocably—whether, even in that case, the same paramount and transcendant power of the crown might not inure to the effect of preserving to his Majesty the right of modifying or altogether revoking the grant, is a question which has never yet arisen, and which, when it does arise, will be found never to have been determined in the negative. But this, at all events, is clear; that when the crown, by an act of grace and bounty, departs, for certain purposes and subject to certain modifications, \*with the property in prize, it by that act plainly [\*55] signifies its intention that the prize shall continue subject to the power of the crown, as it was before the act was done.

This latter proposition is capable of illustration from a variety of sources, which were but slightly adverted to in the argument; for whether we refer to the decisions of venerable judges, to the precedents furnished by prize proclamation, or to the more venerable authority of the letter of the statutes, from all of these it will be found that, in stating the absolute nature of the principle, I have not strained, but have rather fallen short of the truth.

The doctrine has been frequently recognized in cases where the question has arisen subsequently to the capture, and before condemnation: but the same principle was afterwards extended



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in the case of the *Elsebe Mass*(a) at the Cockpit, in which, after final adjudication in the court below, but pending an appeal, and before the final decision of the appeal, the crown thought proper, for reasons of state and public policy, to restore the prize at the expense of the captors. In other words, it was there determined, and that, too, upon a solemn and most able argument, and by a judge the most learned and eminent of his time, the present Lord Stowell, that when the crown saw fit to restore the capture, the captors, who had run the risk and suffered the loss, who had moreover borne the charge of bringing the prize into port, and the further costs of proceeding in the Admiralty to adjudication, and had even undergone additional expenses in contest-  
 [\*56] ing their claim upon appeal, were altogether \*without a remedy. "It is admitted," says Lord Stowell, in language which it would be vain to praise or attempt to imitate, "it is admitted on the part of the captors whose interests have been argued with great force, (and not the less effective, surely, for the extreme decorum with which that force has been tempered), that their claim rests wholly on the order of council, the proclamation, and the Prize Act. It is not, as it cannot be denied that, independent of these instruments, the whole subject matter is in the hands of the crown, as well in point of interest as in point of authority. Prize is altogether a creature of the crown. No man has, or can have, any interest, but what he takes as the mere gift of the crown; beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the crown. The acquisitions of war belong to the crown, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution: it is universally received as a necessary principle of public jurisprudence by all writers on the subject, '*Bello parta cedunt reipublice.*'"(b) Upon that principle, accordingly, and holding that right not to be de-vested by the proclamation, and order in council, and the Prize

(a) 5 Rob. 173.

(b) 5 Rob. 181.

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Act, Lord Stowell decided, that up to the period of final adjudication the crown can restore the prize, without thinking of consulting or taking the consent of the captor, who, at his peril and at the expense of his own blood and treasure, won that prize from the enemy.

It has been strongly argued that the difference between prize proclamations and the warrant in question is this, that the prize proclamations only intimate the intention to [\*57] distribute or to grant, whereas here there is much more—a grant actually executed. The prize proclamation, which was the subject of discussion in the case of the *Elsebe Maas*, now lies before me, and it will presently be seen whether or not that can, with any strictness of speech, be described as an intention indicated, and not a grant made. It is a solemn instrument—a proclamation by the king—and it runs in these terms: “We, being desirous to make it known to our loving subjects, and all others whom it may concern, by this our proclamation, by and with the advice and consent of our privy council,” not that we intend to do this or that, but—“that our will and pleasure is, that the net proceeds of all prize taken, the right whereof is inherent in us and our crown, be granted to the takers, subject to the payment of costs and not otherwise, and the same prize may be so granted in the proportions and manner hereafter set forth, that is to say;”—and then comes the scheme of distribution, according to which the crown’s will and pleasure is, that the prize shall vest and be distributed.

Throughout the whole of the instrument, I find not a letter or syllable that looks like the reservation of a power to alter or revoke. Here is a gift by the crown, of a right inherent in the crown, to be distributed among the captors according to a scheme laid down “herein,” and not elsewhere, to be distributed as “hereafter set forth” and not otherwise, and without a tittle that points to the reserving of a power to revoke, or alter, or modify that scheme. Now I have said that the higher authority of the Act, if higher it be, shall affix the construction to this instru-

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ment, and shall show what is the power of the crown, even after it has issued the prize proclamation, after it has finally approved the scheme of distribution, and finally stated in what way the distribution was to be effected. It might have been [\*58] argued \*from that proclamation, much more strongly than from the warrant under consideration, that the grant was irrevocably vested, and that the gift must be held as upon a conveyance in trust, subject to the direction of the court and the pleasure of the *cestuis que trusts*. That proclamation looks forward to no other Act upon which final distribution is to attach. It does not say in the language of the present warrant, "to be distributed in such way, or according to such scheme as our Lords Commissioners shall lay before us, and as we shall approve of." Observe, nevertheless, how the legislature has treated this very instrument in the Prize Act; and surely, if any statute be german to the matter in hand, it must be the one passed by the authority of the legislature at the beginning of each war, to regulate the rights of parties. No Prize Act ever presumes to interfere with the rights of the crown. No Prize Act ever assumes that the legislature is dealing with the rights of the crown, but suggesting and prefixing a statement, that the crown had given the net proceeds to be dealt with, in terms like the following—"Whereas his Majesty hath, of his royal munificence, been graciously pleased by several proclamations, to declare his will and pleasure to give the benefit of all prize taken during the hostilities in which his Majesty is engaged, to the captors thereof being in his Majesty's service, or duly commissioned"—it then proceeds to declare, adopting and confirming the proclamation, "that the captures be decided and distributed in such manner as his Majesty hath been pleased to order, by the said proclamation of the 7th of July, 1803." But it does not stop there, as, had the grant been irrevocable and unchangeable, it would have done—"or in such manner as his Majesty, his heirs and successors, may order and direct by any proclamation now or hereafter to be issued." Can any person who reads that statute [\*59] doubt, that notwithstanding the words of gift \*used by the crown, notwithstanding the absolute and irrevocable

nature of those words in the prize proclamation, the legislature did look forward to a future period, when the crown might thereafter recall and change the mode of distribution altogether?

Here then is a legislative declaration (for the statute is declaratory merely, and enacts no new law upon the subject), that although the prize proclamation appears to make a distribution according to a scheme, without looking forward to any further approbation or alteration, the crown has still the power to alter that scheme and substitute another, to vary and revoke it, to make a new distribution upon principles wholly different.

Thus much with respect to prize at sea. In general, no Act passes with respect to military prize; nevertheless, that rests upon the same principles of law. The 54 G. 3, c. 86, proceeds accordingly in these terms: "Whereas his Majesty hath, of his royal munificence, been graciously pleased by several proclamations, to declare his will and pleasure to give the benefit of all prizes taken during the hostilities in which his Majesty is engaged, to the captors thereof being in his Majesty's service, or duly commissioned," &c.; and the second section provides, that all captures shall be divided in such proportions, and according to such general rule of distribution, for the army, as shall be established by his Majesty, or in default thereof, in such manner as his Majesty shall under his sign manual be pleased to direct: notwithstanding the preamble had recited that his Majesty had issued his proclamation, stating the mode of distribution that was to be adopted.

I come now to the warrant which lies before me for construction in the present case. It is admitted upon all hands, \*whether the Lords of the Treasury were right or wrong [\*60] in the conclusion they first came to, whether the second conclusion they came to is right or wrong, and whether the first was the same with the second, or the second altered or repealed the first, and substituted a new one, that these are no questions here. The only question raised now, and the only question

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which a court of law can entertain, is this, whether anything was done by the crown in the first warrant, which though a less formal instrument than the proclamation of prize I have referred to, is in substance a proclamation—whether this warrant, under the royal sign manual, affords any foundation for the contention so ably and explicitly maintained, that the crown departed with the property and vested a right in trustees for the benefit of parties in the nature of *cestuis que trusts*, a right which, though springing from a voluntary act of grace and bounty in the giver, became irrevocably vested in the trustees for those parties, and rendered the subsequent orders immaterial, inasmuch as they were superfluous and contradictory to each other.

First, I greatly doubt the propriety of calling this a trust deed, in any sense of the word. It is more like a power of attorney, given without an interest, and therefore revocable; or rather, perhaps, it resembles some of those arrangements, which are said to be of a family nature, for the payment of debts, and in which the principal object is not so much the creditor as the debtor, the maker of the instrument; and in this point of view the case becomes more nearly analogous to *Wallwyn v. Coutts*(a) and *Garrard v. Lauderdale*,(b) than to the cases of *Ellison* [\*61] *v. Ellison*,(c) *Colman v. Sarrell*,(d) \*and *Pulvertoft v. Pulvertoft*;(e) there being rather an agency created for the convenience of the grantor of the deed, than any interest conveyed to trustees for the benefit of those who may become beneficially entitled under it. But without pursuing this inquiry, let us look at the nature of the instrument itself. After reciting the minute of the treasury, and that “it is expedient that a warrant should be issued, to grant the said booty to trustees, to be named by us for the purpose of ascertaining, collecting, and receiving the same”—not for distributing to A. B. and C., the persons beneficially interested—no, but “for the purpose of preparing a scheme for the distribution thereof, conformably to the principles recommended in the said minute; We, taking the premises

(a) 3 Mer. 707.

(c) 6 Ves. 656.

(e) 18 Ves. 84.

(b) 3 Sim. 1.

(d) 1 Ves. jun. 50.

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into our royal consideration, are graciously pleased to give and grant the same to our trustees, for the purpose of collecting, recovering, and receiving the booty." The warrant then proceeds: "and also all moneys into which the plunder or booty or any part thereof may have been converted, as well all such as may already have been secured or received into the hands of the United Company, or any of their officers or servants, or any other persons; as also all such as the trustees may hereafter recover or receive from the United Company, or any of their officers or servants, or any other person whomsoever; and there it ends. The preamble says, "Whereas it is expedient to appoint trustees for the double purpose of collecting in the money, and for preparing a scheme for the distribution thereof;" the operative part says, "you the trustees are hereby vested with the booty, for the purpose of collecting and getting it in," without stating any other purpose. That is totally unlike vesting an interest in them for the purpose of distribution. What follows?

Simply <sup>a</sup> direction or power. The words are, "We do [\*62] hereby empower the said trustees, under the authority, and by the direction of the commissioners of our treasury, to sue for and recover all such booty, and we authorize and empower our said trustees to allow all proper costs and charges, and we do authorize and direct our trustees to prepare a scheme for the distribution of the booty, and of all and every part and parts thereof, conformably to the principle recommended by the minute of the commissioners of the treasury, and approved by us, which scheme shall be submitted by them to the commissioners of our treasury—to be acted upon by them without more ado? no such thing—"which scheme shall be submitted by them to the said commissioners of our treasury, *for the signification of our royal pleasure thereon.*"

Suppose a man were to say, I make you trustees for distributing 1,000*l.* among A., B., and C.; it might be contended that A., B., and C. were *cestuis que trusts*, and that the trustees were answerable to them. But suppose he says, I make you trustees touching certain of my debts, and after you shall have called

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them in, you are to lay before me a scheme, which when I have approved of, you shall then distribute the funds to A., B., and C., or somebody else. Can any one doubt that this would defeat the claim of A., B., and C.? Till I have seen the scheme, and exercised my discretion upon it, and issued what new directions I please, it cannot be said to vest a beneficial interest in the *cestuis que trusts*. All that this deed effects is, to appoint these persons "our trustees" (not trustees for the parties), to collect the fund; and it desires them, in a manner merely directory, to lay a scheme for the distribution before the crown. Now, no such step was taken till the years 1825 and 1826, when a scheme was laid before the crown, and his Majesty thereupon issued [\*63] a new warrant, \*referring to the former, and saying in effect, "I have had a scheme laid before me, and I approve of it." It seems to me, therefore, to be as plain as a matter of fact can be, that the crown in 1826 executed the intention which it professed in 1823, and that it then, for the first time, approved of a scheme of distribution. Then for the first time it made a final distribution, if up to this hour the distribution be final; a point as to which, upon the authority of the statute construing the prize proclamation, and treating it, though it makes no reference to the future, as if it were still subject to the power and revision of the crown, I am inclined to entertain doubt. It is said that the trustees were only called upon to make distribution according to the principles chalked out by the minute of the treasury, and that they were to act merely as calculators. But it seems a most extravagant supposition, and most derogatory to the dignity of the royal functions, that a mere arithmetical operation should be all that was committed to the trustees, and yet that the crown should reserve to itself the power of approving of this arithmetical operation. The trustees are to submit a scheme framed according to certain principles; but where would be the use of coming back with the result of an arithmetical computation which the Lords of the Treasury were to lay before the crown? Was it necessary to put all this machinery in motion—to apply to the treasury, and from the treasury to the crown—in order that the latter might adopt a result founded on a sim-

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ple principle of arithmetic? I cannot so read or understand the warrant, without doing violence to all sound principles of construction.

Reference has been made to the case of *Stevens v. Bagwell*,<sup>(a)</sup> where that which was a matter of bounty, is put upon the \*footing of a right. So far to be sure as the question [\*64] regards the transmission of the right from the grantee, after it has once vested in him, he may sell or assign the bounty; he may transmit it to his heir, or sue for it, and say it has become a matter of right, and is no longer bounty. But is there a shadow of pretence for asserting that, as against the crown, or against trustees standing in the place of the crown, prize is a matter of right and not of bounty? Such a decision will be sought for in vain. The only question, and I doubt whether in a matter so purely the creature of the crown it be a question, is, whether, inasmuch as the arrangement is revocable up to the last moment, the crown could constitutionally render it irrevocable. But here I can have no doubt; for the instrument, instead of making the grant irrevocable, takes express pains to show it to be revocable—if indeed the property be granted at all; which it is not, for the warrant is only an instruction to lay a scheme before the crown, and after that has been approved, to proceed to invest and distribute.

Upon these grounds, I entertain no doubt whatever that this question, upon the merits, is wholly beyond the jurisdiction of the court. Whether the Lords of the Treasury came to a rightful decision in 1823, or to a more rightful decision in 1826; whether the crown has erroneously or properly, correctly or incorrectly, justly or unjustly (using the word in a vague sense, for justice is a term improperly applied to an act of mere grace), come to a decision upon the advice tendered by the Lords of the Treasury, is no question for this place. It is enough for this court, and for the court below, that the crown has given the booty by the instruments before me, and that, notwithstanding



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anything that had been, or had begun to be, granted three years before, the crown had a right so to give it.

[\*65] \*It is said that there is great confusion here; that the decision giving the property to Lord Hastings, as commander in chief, professes to proceed upon one principle, and that the former decision, giving it to Sir Thomas Hislop, under the name of commander in chief, proceeds upon another principle. But all such considerations are met by observing that they are useless and foreign to the question in hand, unless they raise some doubt upon the construction of the instrument. Those who so argue, do not pretend to say that this instrument is not plain. It is too plain and too strong for them. Their argument is, that the prize was once given to Sir Thomas Hislop, and now to Lord Hastings; once to Sir T. Hislop by one royal warrant, and now to Lord Hastings by another; which latter, they contend, affects most inconsistently to proceed upon a recognition of the former. But suppose the first instrument had said, "the actual captors shall have the booty," and the second instrument had said, "whereas it is right to adhere to the first instrument, and that the actual captors should have the booty, and whereas Sir T. Hislop is the actual captor, nevertheless, we please to give it, not to the actual captor, but to Lord Hastings, the constructive captor;" that would be much stronger than the present case: nevertheless, if it be clear in the operative part of the grant, whatever the reasons in the recital may be, that the crown meant to dispose of the property by the last grant, the crown had the power so to do, notwithstanding this inchoate proceeding, be it inconsistent, be it self contradictory or repugnant to the other. If, therefore, it be clear that the crown so intended, the crown had the right; and the crown having the right, and having exercised it, the appellant can have no title to raise the question here, whether the crown acted well, or was well and wisely advised in bestowing the bounty upon others.

\*ADAMSON v. EVITT.

[\*66]

ROLLS.—1830: 15th and 22d November.

Where the grantee of an annuity is induced by false representations or improper concealment of facts on the part of the grantor or his agent, to become the purchaser of an annuity, although he may have relief at law, a court of equity has concurrent jurisdiction.

The grantor and his agent in such transactions are not bound to disclose all the circumstances of the grantor's situation; they are, however, bound to give honest answers to questions put to them.

THE plaintiff was an auctioneer, who for the price of 700*l.* had purchased from Lea an annuity of 85*l.* a year for three lives, on the personal security of Lea and two sureties; the defendants were the solicitors who had conducted the negotiations and completed the transaction. The annuity was paid during three years; but no more payments were made on account of it; and the grantor and his sureties were insolvent, so that it was now of no value. The bill charged that the defendants had concealed from the plaintiff, facts which it was their duty to have disclosed to him, and had misrepresented to him the circumstances of Lea and the sureties; and it prayed that it might be declared that they had by these means fraudulently induced him to become the purchaser of the annuity, and that they might be made answerable for the loss which he had thereby sustained.

Lea was a clerk in the service of the East India Company, at a fixed salary of 800*l.* a year, and he received an additional 100*l.* a year, as clerk to one of the committees. In 1819, being indebted to nearly the amount of 1,300*l.*, he applied to the defendants to undertake the arrangement of his affairs. To provide a fund for the payment of his debts, he assigned to three trustees, of whom Evitt was one, 400*l.* a year out of his salary, and the lease of his house, and executed a warrant of attorney to enter up judgment against him for 2,000*l.* Shortly afterwards it was determined to raise a sum of 700*l.* by way of annuity, and Evitt proposed the security to Adamson, for whom, though he

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was not his regular solicitor, he had in the course of [\*67] twenty years been concerned \*in money transactions three or four times. The annuity was to be at the rate of twelve per cent., and the security was to be the personal security of Lea and two sureties. At one time Evitt had agreed to be one of the sureties, if two others could not be found; but other sureties were found, one of whom was a purser in the service of the East India Company, with an income of between 300*l.* and 400*l.* a year, and the other was a clerk in the war office, at a yearly salary of 300*l.* The defendants, with the consent of the plaintiff, prepared the securities; he paid to them the 700*l.*; and they placed it to the credit of Lea's account, on which there was, at that time and previous to the receipt of this sum, a balance of 150*l.* in Lea's favor. On the other hand, they, as indorsers of a bill for his accommodation, were under a liability for him to an amount of about 200*l.* In the three following years the account was turned against Lea; and a balance of several hundred pounds became due from him to the defendants.

Mr. *Bickersteth* and Mr. *Roupell* for the plaintiff.

It is clear that, at the time of the purchase of the annuity, Lea was entirely insolvent, and that the plaintiff never would have advanced his money on the personal security of an individual in such circumstances. The situation of Lea was well known to Evitt, and it was his duty to have communicated to the plaintiff everything which it was fit the plaintiff should know, with a view to his guidance in the transaction. No professional man, except Evitt and his partner, was concerned in the matter. They must, therefore, have acted as the solicitors and agents of both parties: and, as the solicitors of the plaintiff, they prepared the deeds, and entered up the judgment. The liability under which they at that time were for Lea, gave them a direct interest in inducing Adamson to advance his money. If the latter [\*68] \*had been aware of that circumstance, it would probably have deterred him from trusting Lea, and he would, at least, not have placed unlimited confidence in the defendants.

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as his agents, had he been aware that they had an interest adverse to his own.

Evitt must have represented to Adamson that Lea was a solvent man, and that his personal obligation was a good security. The offer to be himself one of the sureties for the payment of the annuity, is in itself a representation that Lea might safely be trusted, and shows that, in the negotiation, the defendants must have held out Lea as a man of solvent circumstances. It is admitted that they stated he had a salary of about 1,000*l.* a year: in fact, his salary was only 900*l.* a year, of which 400*l.* had been assigned, so that his disposable income could not be more than 500*l.* a year.

Thus, by the fraudulent concealment of facts, which ought to have been communicated to the plaintiff, and by fraudulent misrepresentations of the pecuniary circumstances of Lea, the defendants induced the plaintiff to become the purchaser of an annuity, which now turns out to be of no value, and to pay to them, as a consideration for it, a sum of 700*l.* They are bound, in a court of equity, to make good the loss which their fraud has occasioned.

*Mr. Pemberton and Mr. Wakefield, contra.*

The plaintiff, who has long been engaged in an extensive business, trusted his own judgment in this matter: he did not require the assistance of an attorney to advise him as to the prudence or imprudence of lending money on the proposed security: and the single circumstance of his allowing the deeds to be prepared by Evitt and his partner, will not make them his agents \*in negotiating and concluding the terms [\*69] of the contract. He was to get an annuity during three lives, and the life of the survivor, at the rate of twelve per cent., and he was to have the security of three persons: and, for so extravagant a rate of profit, he was willing to run some hazard. Concealment and misrepresentation are positively denied; and

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there is no evidence to contradict the answer. The representation that Lea had a salary of about 1,000*l.* a year, was sufficiently accurate; and of what importance is it, that he, at that time, owed debts to the amount of about 1,300*l.*? The plaintiff never could have supposed that he was dealing with a person in unembarrassed circumstances: for, what man, except under the pressure of extreme pecuniary difficulties, would have consented to grant an annuity of 85*l.* a year for so small a sum as 700*l.*?

But even if the defendants have been guilty of concealment or misrepresentation, what right has the plaintiff to come into a court of equity? His case, according to his own statement, is, that the defendants, acting as his solicitors, have fraudulently procured him to advance money on a bad security; why then does he not bring an action at law against them? The alleged wrong of which he complains, is a legal wrong; and a judgment at law, if he be right on the merits, would give him the relief he asks.

Mr. *Bickersteth*, in reply.

The wrong of which we complain, is a loss occasioned by fraud, and that fraud was the fraud of our agent. In respect, therefore, both of the fraud, and the confidential relation subsisting between those who practised the fraud and him who suffered by it, a court of equity has jurisdiction.

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[\*70] \**Nov. 22d.*—THE MASTER OF THE ROLLS:—The plaintiff was the purchaser of an annuity of 85*l.* for three lives, for the sum of 700*l.* The defendants are solicitors, who, on the part of the grantor of the annuity, proposed the purchase to the plaintiff: and the defendant Evitt had at one time proposed to become a surety for the payment of the annuity, if two other sureties could not be found; but two other sureties were found. The deeds were prepared by the defendants, with the consent of the plaintiff: and the annuity was regularly paid for three years by Evitt, who had a running account with Lea

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the grantor, and charged him in that account with the amount of those payments.

The bill charges that the plaintiff was induced to become the purchaser of the annuity by the misrepresentations of the defendants as to the circumstances of the grantor and his sureties, and by their concealment of a part of the facts relative to the actual circumstances of the grantor and his sureties, which were well known to them: and the defendants, it is alleged, had an interest in the raising of the money; inasmuch as the grantor was indebted to them at the time, and they were under liabilities on his account, and the purchase money was to be applied to their payment and indemnity.

If, by the misrepresentation, on the part of the defendants, of facts relating to the circumstances of the grantor or his sureties, or by the concealment, on the part of the defendants, of facts relating to those circumstances, which the defendants were bound to disclose, the plaintiff was induced to become the purchaser of this annuity, and has in consequence suffered a loss, there can, I think, be no doubt that the plaintiff could sustain an action at law for damages against the defendants, in the nature of \*an action of deceit. But this court, neverthe- [\*71] less, with respect to the fraud, would have a concurrent jurisdiction with a court of law. These principles were fully discussed in the case of *Evans v. Bicknell*.(a)

The only representation, admitted by the defendant to have been made to the plaintiff, was, that the grantor was an officer of the East India Company, with a salary of about 1,000*l.* a year: and in truth, he was such an officer, with a salary of about 900*l.* All other misrepresentations (if this can be deemed a misrepresentation) are expressly denied.

It is proved that the defendant Evitt did at first offer to become security for this grantor, though he did not ultimately enter into that engagement; and it is argued that this offer to become a

(a) 6 Ves. 173.

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surety, is evidence that he represented the grantor as a person in competent circumstances. I cannot charge the defendants by such an inference. The request of the plaintiff that the defendant should be a surety, rather affords evidence that the plaintiff had not full confidence in the solvency of the grantor. There is no evidence or admission of any material representation on the part of the defendants, with respect to the sureties. .

It appears that the grantor, being indebted to the extent of 1,300*l.*, had shortly previous to the grant, executed a deed, whereby he assigned 400*l.* a year, part of his salary, and the lease of the house in which he lived, to trustees for the benefit of his creditors; that he had confessed a judgment for 2,000*l.* for the same purpose; and that the defendants in these transactions were concerned for him as his attorneys. It is said, that [\*72] they \*ought to have disclosed these circumstances to the plaintiff; being to be considered as his attorneys also, because, with his consent, they prepared the annuity deed. The mere preparation of the deed could not place the defendants in a confidential relation towards the plaintiff in this transaction.

The grantor of an annuity is not bound to lay open to the intended grantee all the circumstances of his situation. He is bound only to give honest answers to questions put to him by the intended grantee. The agents of the grantor stand in his situation, and are not bound to do more.

There was at the time of this grant a running account between the grantor and the defendants, upon which the defendants were then indebted to the grantor in the sum of 150*l.*; but they were under liabilities for him to the amount of 200*l.*; so that, upon the whole, they might be protected to the amount of 50*l.* by this purchase of the annuity. The defendants were clearly not bound to disclose these circumstances to the plaintiff. But the head of concealment in this case is altogether out of the question. So far from any concealment being admitted, the answer of the defendant Evitt, with whom principally Adamson professes to

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Brook v. Smith.

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have dealt, expressly states, that all these circumstances were disclosed to the plaintiff before his purchase, and that the plaintiff relied upon the inquiries which he himself made with respect to the grantor and the sureties.

The grant of the annuity of 85*l.* is for three lives; and the price paid is a sum of 700*l.* The plaintiff is an auctioneer, and accustomed, no doubt, to transactions of this nature. He could not but know that the grantor was in embarrassed circumstances; for no person not \*embarrassed would submit to such terms. The very terms of the purchase imported hazard in the transaction. [\*73]

The plaintiff has made out no case, which can in reason throw the loss upon the defendants: and the bill must be dismissed with costs.

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BROOK v. SMITH.

ROLLS.—1830: 26th November.

The testator devised his estates to two tenants in common in fee; one died after the testator, leaving an infant heir. In a creditor's suit, after a decree for sale of the estate, the infant heir was ordered to join in the conveyance to the purchaser, under the 1 W. 4, c. 47, s. 11.

THIS was a creditor's suit; and a decree had been obtained for the sale of the estate of the debtor. He had devised his lands to two persons as tenants in common in fee: one of them had died intestate, leaving an infant heir. The present petition was presented in the cause and under the 1 W. 4, ch. 47, sec. 11,(a) praying that the \*infant heir of the devisee might [\*74] be directed to join in the conveyance to the purchaser.

(a) " And be it further enacted, that, where any suit hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as



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Chapman v. Tennant.

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A doubt was suggested by Mr. *Piggott*, whether the eleventh section of the Act applied to a case like this, where the infant was neither the heir nor the devisee of the debtor, but was the heir of the devisee.

THE MASTER OF THE ROLLS, considering the case to be within the statute, made the order.

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CHAPMAN v. TENNANT.

ROLLS.—1830: 21st December.

The eleventh section of the 1 W. 4, ch. 47, extended to a case where the decree in the cause was made prior to the act.

THIS was a creditor's suit; and a decree had been made in it prior to the 1 W. 4, ch. 47, for the sale of an estate for the payment of debts: but the estate was not actually sold until after the passing of that Act.

The petition of the plaintiff now prayed, that the heir and devisee, who were both infants, might be directed, under the eleventh section of that Act, to convey to the purchaser.

It was observed, that though the words at the beginning of the clause—"where any suit hath been or shall be instituted"—clearly include suits previously instituted, as well as suits which should be instituted afterwards; yet, in the next number of the

the law at present stands, be compelled, in every such case such court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years."

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Shewen v. Vanderhorst.

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sentence, terms of narrower import are used; and the case in which the clause is to apply, is stated to be, where—"such court of equity *shall* decree"—not—"shall have decreed or shall decree"—the estates to be sold. On this ground a doubt \*was suggested, whether the Act applied where the decree was pronounced prior to the passing of the Act. [\*75]

THE MASTER OF THE ROLLS observed, that although the authority was plainly given in suits which had been commenced prior to the Act, yet the subsequent language seemed to point to sales under decrees made subsequent to this Act: but considering the case to be within the spirit and intention of the Act, he made the order as prayed.

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SHEWEN v. VANDERHORST.

ROLLS.—1830: 4th December.

After a decree in a suit for the administration of assets, an executor is not at liberty to do any act which affects the relative rights of creditors.

UPON an account of debts before the Master, in a suit for the administration of assets, the plaintiff had objected to the demand of a creditor, upon the ground that it was barred by the Statute of Limitations, and the Master allowed the objection, though the executor did not set it up, and was willing to waive it.

The creditor excepted to the Master's report; insisting that the executor of the debtor was at liberty, if he thought fit, not to set up the Statute of Limitations as a bar to any debt, and that, as he had not insisted upon it, the plaintiff could not raise the objection.

THE MASTER OF THE ROLLS overruled the exception. He stated the ground of his decision to be, that, after a decree, the

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executor was not at liberty to do any act which affected the relative rights of creditors.

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[\*76] \*His Honor's decision was, on appeal, confirmed by the Lord Chancellor.(a)

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DAVIS v. BATTINE.

Rolls.—1830: 7th December.

A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is, nevertheless, entitled to the benefit of his mortgage security.

A CREDITOR, who had a mortgage security for his debt, had sued the debtor, and taken him in execution. The debtor afterwards took the benefit of the Insolvent Act.

On an exception to the Master's report, the question was raised, whether the debt was not satisfied by the body of the debtor having been taken in execution, so as to extinguish the lien of the creditor on the land.

Mr. Treslove and Mr. Martin, in support of the exception.

In *Barnaby's Case*,(b) it was held that a creditor, who had taken the body of his debtor in execution, could not be a petitioning creditor to sustain a commission of bankrupt; because the body of the debtor being in execution, was, in point of law, a satisfaction of the debt. If the debt be absolutely satisfied, how can the creditor claim further satisfaction? No instance can be ad-

(a) The argument and judgment on the appeal have been already reported in 1 Russ. & Mylne, 347, but, from an accidental circumstance, the ground of the decision of the Master of the Rolls is not there stated.

(b) 1 Strange, 653.

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Walsh v. Wallinger.

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duced in which a mortgagee having taken the body of the mortgagor in execution for the mortgage debt, has gone on to foreclose. The principle of the court is, \*that a mortgagee, though he may have recourse to all his remedies, cannot have a double satisfaction. If he forecloses and sells the estate, he will not be permitted afterwards to sue on the covenant for the deficiency. *Perry v. Barker*,<sup>(a)</sup> *Tooke v. Hartley*.<sup>(b)</sup> [\*77]

Mr. Wilbraham, *contra*.

THE MASTER OF THE ROLLS said, he did not remember to have heard it ever suggested that a mortgagee, by proceeding to execution against the body of the debtor, released his interest in the land; and he overruled the exception.

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\*WALSH v. WALLINGER.

[\*78]

ROLLS—1830: 3d and 6th December.

Where there is no appointment under a power, and no gift over in default of appointment, those persons only will take who could take by appointment.

A testator gave the residue of his personal estate to his wife, for her own sole use and disposal, trusting that she would thereout provide for his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him, as she should appoint: Held, that the wife could appoint only by will, and that children living at her death were alone entitled to share in an unappointed portion of the fund.

THE testator, John W. Arnold Wallinger, by his will, dated the 19th of January, 1805, gave his personal estate to his wife, Matilda, for her own use and benefit, and devised all his real estates to trustees upon trust to sell the same, and, after deducting the expenses of the sale, and paying the incumbrances thereon, and all his just debts, to pay the residue "unto his said wife, to

(a) 13 Ves. 198.

(b) 2 Bro. C. C. 125, and see *Greenwood v. Taylor*, 1 R. & My. 185.

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Walsh v. Wallinger.

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and for her own use and benefit, and disposal, trusting that she would thereout provide for and maintain his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him, in such manner as she should appoint."

The testator died on the 23d of January, 1805, leaving his widow, a son, and eight daughters, him surviving.

By an indenture, bearing date the 14th of February, 1817, to which John A. Wallinger, the son, was a party, the mother, in order to place him advantageously in partnership, appointed to him the sum of 1,000*l.*, part of the residuary fund: and it was thereby declared and agreed between her and him, "that he the said John A. Wallinger, should not be entitled to any further or other portion or share of and in the residue of the moneys arising from the sale of the real estate of John W. Arnold Wallinger, deceased, unless the said Matilda Wallinger should, by any deed or deeds in writing, under her hand and seal, or by her last will and testament, make any further appointment or disposition in favor of him the said John A. Wallinger from or out of the same." This sum of 1,000*l.* was raised and paid to the son.

[\*79] \*Caroline, one of the daughters, died in 1828, without having had any part of the fund appointed to her.

The widow, by her will, executed in May, 1828, reciting that two of the daughters were amply provided for, and that her son had already received 1,000*l.*, which was as much as could be spared from the daughters, directed that these two daughters and the son should not have any share in her property, and appointed the residue of the trust moneys to her other five surviving daughters in equal shares.

The bill was filed by the five appointees and their husbands, and prayed that the will might be declared a valid execution of the power.

One question in the cause was, whether the widow could appoint to some of the children, totally excluding others.

Mr. Pemberton and Mr. Langley, for the plaintiffs.

Mr. Tinney and Mr. Temple, for other parties in the same interest.

It was the intention of the testator to give his wife a very large discretionary power over his property; the only limit to her discretion was, that no part of the residue was to be given to any person who was not a child of his; but so long as the whole of it was enjoyed by a child or children, she might give it to any one or more of them, according as she might think fit. She was to have an absolute power of selection. In *Civil v. Rich*,<sup>(a)</sup> the power was to give "to children and grandchildren, according to their demerits:" and a gift of the whole to one was sustained. In *Burrell v. Burrell*,<sup>(b)</sup> a \*testator [\*80] gave all his real and personal estate to his wife, "to the end she might give his children such fortunes as she should think proper, or they best deserve:" and an appointment, which gave a son only one guinea, and was so far clearly illusory, unless the donee of the power was authorized to exclude him *in toto*, was held to be good. *Gibson v. Kinven*,<sup>(c)</sup> *Spencer v. Spencer*,<sup>(d)</sup> *Kemp v. Kemp*.<sup>(e)</sup>

Mr. Bickersteth and Mr. Cooke, *contra*.

The property is to go to the children in such manner, that is to say, in such manner and proportions as the widow should appoint. All are to participate substantially: and her authority is merely to vary the respective shares. *Kemp v. Kemp*, *Vanderzee v. Aclom*,<sup>(g)</sup> *Mason v. Limbery*.<sup>(h)</sup>

(a) 1 Ch. Ca. 309 and 2 Chan. Rep. 141. (e) 5 Ves. 861.

(b) Amb. 660.

(g) 4 Ves. 771.

(c) 1 Vern. 66.

(h) Cited in Sugden on Powers, 401,

(d) 5 Ves. 362.

4th edition.

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Walah v. Wallinger.

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**THE MASTER OF THE ROLLS:**—The question is, whether the words “in such manner as she shall appoint,” import that the widow was to have the power to exclude any of the children, or merely that she was to give the property to them in such shares as she might think fit, and as might best suit their respective circumstances. If the direction had been, that at her death the property should go to the children as she should appoint, all the children, according to decided cases, must have taken. There is no sensible or substantial distinction between such a direction and the expressions which are used here. Therefore, all the children are entitled, who were capable of taking under an appointment by the mother.

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Another question was, whether the personal representatives \*of Caroline, who died in the lifetime of the widow, were entitled to share in a part of the property which was unappointed by the will of the mother.

*Dec. 6th.*—On the one side, it was argued that the mother could make only a testamentary appointment: her power was to give and bequeath, and the instrument was not to take effect till after her death. In *Doe v. Thorley*,<sup>(a)</sup> the word “leave” occurring in a power, was held to import that the appointment should be made by will. In *Kennedy v. Kingston*,<sup>(b)</sup> where a sum of money was given to a woman for life, “and, at her death, to divide it in portions as she should choose to her children,” a question was raised, whether an unappointed portion of the fund belonged exclusively to children living at her death: and Sir Thomas Plumer said “as the power is to be executed at her decease, it must be for the benefit of those capable of taking. It is, therefore, necessarily confined to children in existence at the time of her death.” The principle of that case has since been approved and followed in *Needham v. Smith*.<sup>(c)</sup>

<sup>(a)</sup> 10 East, 438.

<sup>(c)</sup> 4 Russ. 318.

<sup>(b)</sup> 2 Jac. & Walk. 431.

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 Walsh v. Wallinger.
 

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On the other hand, it was contended, that under the words of the testator's will, an interest vested in each child, liable only to be devested by a valid appointment, and therefore that the deceased child took an interest which was never devested: *Vanderzee v. Aclom*,<sup>(a)</sup> *Boyle v. Bishop of Petersburg*,<sup>(b)</sup> *Roper on Legacies*.<sup>(c)</sup> Besides, that deceased child might have had a valid appointment made to her. The authority of *Malim v. Keighley*,<sup>(d)</sup> (afterwards reconsidered under the \*name of [82] *Malim v. Barker*),<sup>(e)</sup> was directly opposed to the decision in *Kennedy v. Kingston*, and was not referred to in the argument of the latter case. Though the gift was not to come into possession till the death of the mother, she might have made an irrevocable appointment by deed in her lifetime. The words did not restrict the widow to an appointment by will; *Grace v. Wilson*.<sup>(g)</sup>

**THE MASTER OF THE ROLLS:**—Unless the interest be expressly given over in case of no appointment, those children only will take who could take by appointment.

The power here was plainly testamentary, and could be executed only in favor of children who could take by will; and the part unappointed must be divided between the children who were living at the mother's death.

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"Declare that the appointment of the trust fund in the pleadings mentioned, made by the will of Matilda Wallinger, is void, and that the said trust funds are divisible between the plaintiffs Matilda, Charlotte, Mary Anne, Harriet, and Louisa, and the defendants Ann Maria and Elizabeth Francesca, the only children of the testator in the pleadings named, who were living at the death of Matilda Wallinger, except the defendant J. A. Wallinger, in equal seventh parts," &c.

Reg. Lib. 1830. B. 515.

(a) 4 Ves. 771.

(b) 1 Ves. jun. 299.

(c) Vol. I. p. 537.

(d) 2 Ves. jun. 333, 529.

(e) 3 Ves. 150.

(g) Sugd. on Powers, 219, 4th edition.



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 Browne v. Blount.
 

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[\*88]

\*BROWNE v. BLOUNT.

ROLLS.—1830: 8th December.

Where the person, whose interests are sought to be affected by the decree, is out of the jurisdiction of the court, the suit cannot proceed in his absence.

THE plaintiff, being a judgment creditor of Sir Charles Blount, sued out a writ of *elegit* upon his judgment, and filed his bill for the purpose of equitable execution against certain real estates which were vested in trustees, upon certain trusts, under which Sir C. Blount was now entitled to the rents and profits during his life. The defendants were the trustees in whom the estates were vested; a son of Sir Charles Blount, who had also an equitable interest under the trusts; and certain persons who, under a decree of the Vice-Chancellor, had obtained a charge upon the trust estate in respect of another judgment debt.

Sir Charles Blount was now abroad, and had been abroad many years prior to the institution of the suit.

Mr. *Bickersteth* and Mr. *Hull* submitted, on the part of the plaintiff, that as the legal estate was vested in the defendants, the trustees, the debtor himself was merely a formal and passive party, and the plaintiff was therefore relieved from the necessity of having him before the court. In *Cockburn v. Thompson*,<sup>(a)</sup> Lord Eldon observed, that the rule, requiring all persons materially interested to be before the court, had been dispensed with in a great variety of cases as to persons out of its jurisdiction; and that there were many instances of justice administered here in the absence of those, without whose presence, as parties, if they were within the jurisdiction, it would not be administered.

In *Smith v. Hibernian Mine Company*,<sup>(b)</sup> it is laid down,  
 [\*84] \*that where persons interested are out of the jurisdiction, although the court cannot compel them to do any act, it

(a) 16 Ves. 321, see p. 326.

(b) 1 Scho. &amp; Lef. 238.

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Browne v. Blount.

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can proceed against the other parties, and if the disposition of the property is in the power of such parties, the court may act upon it.

Mr. *Pemberton* and Mr. *Bethell*, for the trustees, contended that the principle upon which it was impossible for a mortgagee to call for an account in the absence of the mortgagor or his heirs, according to the cases of *Fell v. Brown*(a) and *Bradshaw v. Outram*,(b) must equally apply to prevent the plaintiff from proceeding with the present suit; since the only substantial relief sought by his bill was directed against an individual who had not come within the jurisdiction.

Sir C. *Wetherell*, Mr. *Combe* and Mr. *Bridger*, for other parties.

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*Dec. 8th.*—The cause having stood over for a few days, that the cases upon the point might be further examined, the following additional authorities were cited and commented upon: *Walley v. Walley*,(c) *Heath v. Percival*,(d) *Cowslad v. Cely*,(e) *Rogers v. Linton*,(g) *Darwent v. Walton*,(h) *Attorney-General v. Balliol College*,(i) *Williams v. Whinyates*,(k) *Thompson v. Topham*,(l) *Redesdale on Pleading*,(m) The plaintiff's counsel also referred to the cases of *Curling v. Marquis Townshend*(n) and *Tanfield v. Irvine*,(o) as showing that even if the court \*could not grant all the relief prayed, it would at least [\*85] go the length of appointing a receiver.

THE MASTER OF THE ROLLS stopped the cause, stating that Sir Charles Blount being the person whose interests were sought

(a) 2 Bro. C. C. 276.

(b) 13 Ves. 234; *Farmer v. Curtis*, 2 Sim. 466.

(c) 1 Verm. 484.

(d) 1 P. Wms. 681.

(e) *Pres. Ch.* 83.

(g) *Ranb.* 200.

(h) 2 Atk. 510.

(i) 9 Mod. 407.

(k) 2 Bro. C. C. 399.

(l) 1 Y. & Jerv. 558.

(m) Page 172, 4th edition.

(n) 19 Ves. 628.

(o) 2 Russ. 149; *Coward v. Chadwick*, *ibid.* 150, n.

## Hopkins v. Myall.

to be affected by the decree, the suit could not proceed in his absence.<sup>(a)</sup>

[\*86]

## \*HOPKINS v. MYALL.

ROLLS.—1830: 10th December.

Where, on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, and attested by two witnesses, and for default of appointment to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife, by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children.

UPON the marriage of Mr. and Mrs. Myall, certain property of the wife was assigned to trustees, upon trust for the wife during her life for her separate use, with remainder as the wife should appoint by any writing under her hand attested by two witnesses; and for default of appointment, then, after the death of the wife, to the children of the marriage in manner therein mentioned.

The trustees, upon an application of the husband and wife, made by letter signed by both of them, but not attested, parted with the trust fund to the husband. The wife died without having made any other appointment of the fund.

The present bill was filed by the children after the death of the mother, to charge the trustees for a breach of trust, and to compel them to replace the fund.

Mr. *Bickersteth* and Mr. *Jacob*, for the plaintiffs.

Mr. *Rolfe* and Mr. *Pattison contra*, submitted that this was analogous to the case of an informal appointment, which, though

(a) So *Roveray v. Grayson*, 3 Swan. 145, n.; *Stratton v. Davidson*, 1 Russ. & Myl. 484. Lord Eldon appears to have sanctioned some relaxation of the strict rule in cases of interpleader; see *Stevenson v. Anderson*, 2 Ves. & B. 407; *Martinius v. Helmutz*, *ibid.* 412, 2d edition.

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not executed strictly according to the power, would nevertheless be referred to it, and be upheld as an effectual execution in equity, provided the intention to dispose of the fund was clearly manifested; *Blake v. Marnell*,<sup>(a)</sup> *Roulledge v. Dorril*.<sup>(b)</sup> The general rule was, that if a trustee, who holds a fund in his hands, \*pays it over to a third party by the direction of the *cestui* [\*87] *que trust*, such payment cannot be afterwards recovered back from the trustee, and no authority could be found which raises any exception in favor of a feme covert; *Pollard v. Greenvil*,<sup>(c)</sup> *Wright v. Englefield*,<sup>(d)</sup> *Moodie v. Reid*.<sup>(e)</sup>

THE MASTER OF THE ROLLS:—The ceremonies required by the settlement were introduced for the express purpose of protecting the wife against the influence of the husband, and are matters of substance, and not of form; and without an adherence to those ceremonies, the interests of the children could not be defeated.<sup>(g)</sup>

KENDALL v. BECKETT.

[\*88]

1880: 8th, 10th, 11th and 22d December.

In a suit by a purchaser to compel specific performance of a contract for the sale of a reversionary interest in stock, or in the alternative, to have the deposit repaid, the court having decided against the plaintiff's right to the principal relief sought, refused the alternative part of the prayer, and dismissed the bill with costs.

THIS was a suit, instituted by the purchaser of a reversionary interest in a sum of stock, against the executors of the vendor, and against several other parties interested in the fund, for the purpose of enforcing a specific performance of the contract. In the event of the court refusing that relief, the bill prayed, in the alternative, that the plaintiff might be declared to be a creditor

(a) 2 Ba. & Be. 35.

(b) 2 Ves. jun. 357.

(c) 1 Ch. Ca. 10.

(d) Amb. 468.

(e) 1 Mad. 516.

(g) *Cocker v. Quayle*, 1 Russ. & My. 535.

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of the defendants, the executors, to the amount of 25*l.*, the sum which he had paid by way of deposit on his purchase.

The Vice-Chancellor having dismissed the bill with costs, the plaintiff appealed to the Lord Chancellor.

Mr. *Knight* and Mr. *M'Dougall* for the appellant, contended, that, upon the result of the evidence in the cause, the price obtained was ample, and the whole transaction stood clear and above suspicion. The sale had taken place under circumstances which made it equivalent to a sale by auction, so that the purchaser was relieved from the burden of proving the adequacy of the consideration; *Shelly v. Nash*,<sup>(a)</sup> That the great rise in the value of the property sold, consequent upon the death of the tenant for life of the stock shortly after the transaction took place, did not affect the validity of the sale, was clear, upon the principles laid down in *Jackson v. Lever*,<sup>(b)</sup> and *Kenny v. Wes-ham*,<sup>(c)</sup> and the decisions in *Doloret v Rothschild*,<sup>(d)</sup> and [\*89] *Adderley v. Dixon*,<sup>(e)</sup> \*satisfactorily showed that equity would decree the specific performance of a contract of which the subject matter was a chose in action.

If, however, on examining the evidence, the court should be of opinion against the plaintiff's right to a specific execution of his contract, he would then be clearly entitled to a decree for repayment of his deposit. This alternative relief was expressly asked by the prayer, which was purposely so framed in order to avoid a circuitry of actions, and to enable complete justice to be done between the parties, an object which courts of equity were always anxious to attain. To that extent, at least, the Vice-Chancellor's decision must be reversed. *Denton v. Stewart*,<sup>(g)</sup> and *Greenaway v. Adams*,<sup>(h)</sup> were authorities for such a decree.

(a) 3 Madd. 232.

(b) 3 Bro. C. C. 605.

(c) 6 Madd. 355.

(d) 1 Sim. & S. 500.

(g) Reported in the note to *Todd v. Gee*, 17 Ves. 276.

(e) 1 Sim. & S. 607.

(h) 12 Ves. 395.

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Kendall v. Beckett.

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The *Solicitor-General*, Sir E. Sugden, Mr. Agar, Mr. Skirrow, Mr. Rose, Mr. Hayter, Mr. Kindersley, Mr. Bethell, and Mr. Milford, appeared for different defendants.

They cited and relied upon *Peacock v. Evans*,<sup>(a)</sup> and *Gowland v. De Faria*,<sup>(b)</sup> where Sir W. Grant considered it to be perfectly settled, that the purchaser of a reversionary interest, seeking to enforce his bargain, was bound to show that a full and adequate consideration had been paid. In the present instance, the plaintiff had utterly failed in making out that point, and it was unnecessary to enter into the other questions that had been raised. *Shelly v. Nash* was overruled by *Fox v. Wright*.<sup>(c)</sup>

\*THE LORD CHANCELLOR held it to be clear, as laid [\*90] down by Sir W. Grant in the cases referred to, that where the purchaser of a reversionary interest sought the assistance of the court, the burden was imposed on him of showing that the transaction had been in all respects fair, and that a full and adequate consideration had been given. So far from the plaintiff having complied with that exigency in the present instance, there was a preponderating weight of evidence tending to prove that the price had been inadequate. Without going into the particular details of that evidence, or computing the exact *quantum* of inadequacy, it was enough to say generally that the plaintiff had altogether failed in making out a case for the interposition of the court. The main object of the suit having thus signally failed, there only remained to be disposed of the question raised by the alternative part of the prayer, asking repayment of the deposit as a debt. In a case, however, where the sum was so very small, and where it was admitted, moreover, that no demand had been ever made, the court would be extremely slow in acceding to such a claim, especially in favor of a party whose conduct was tainted with unconscientious dealing. Even under circumstances entitled to favor, the jurisdiction was at best extremely doubtful. The language of Lord Eldon in *Tidd v.*

(a) 16 Ves. 412.

(b) 17 Ves. 20.

(c) 6 Madd. 111.

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Handfield v. Wildes.

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*Gee*, (a) speaking of *Denton v. Stewart* (which had been cited in the case under appeal), distinctly showed the opinion of his Lordship, that, except in a very special case indeed, the species of relief prayed in the alternative by this bill ought never to be granted, and no such case was now presented to the court.

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*December 22d.*—His Lordship, on a subsequent day, observed that it had always been held to be a sound rule of practice, \*and it was one from which he was not disposed to depart, that a plaintiff should not be permitted to introduce into a corner of a bill some secondary and trivial claim, on which, if it stood alone, he might be entitled to succeed, in order as it were to catch a decree on a minor point, in the event of his failing in the main object of the suit. The prayer for the restitution of the deposit money he considered to come within this description. The decree, therefore, must be affirmed generally, and the bill be dismissed with costs.

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HANDFIELD V. WILDES.

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1830: 13th December.

To ground an order for the serjeant at arms under the 1 W. 4, ch. 36, s. 15, rule 1, the affidavit must state the party's belief that, at the time of suing forth the attachment, the defendant was in the county into which the writ was issued, and not merely that his last known place of residence was in that county.

MR. DIXON moved that the serjeant at arms should be directed to bring up a defendant to answer his contempt.

The party against whom the application was made was one of several defendants; after entering an appearance he had gone abroad out of the jurisdiction, and the plaintiff now wished to

proceed to take the bill *pro confesso* as against him, under the provisions of the 1 W. 4, c. 36.(a) The motion was supported by the affidavit of \*the managing clerk of the [92] plaintiff's town agent, by whom the writ was sued out.

The affidavit stated that the writ of attachment was regularly issued, on the defendant being in contempt for not putting in his answer; that a return of *non est inventus* was thereupon made by the sheriff; that all due diligence had been used to ascertain the defendant's place of residence at the time when the writ was issued, and to apprehend him by virtue thereof; and that at that time the defendant's last and only known place of abode was in the county of Middlesex, the county into which the writ was issued.

THE LORD CHANCELLOR was inclined to think that an affidavit made by the town agent's managing clerk, he being the person to whom the duty of making such inquiries was generally committed, might perhaps be a sufficient compliance with the exigency of the statute; but it was not necessary to decide that point, as he considered the affidavit to be clearly defective, in not swearing to the party's belief that the defendant was in the county at the time of the issuing of the writ; an omission which

(a) The first rule of the fifteenth section of the Act, upon which the question arose, is as follows: "That when a writ of attachment shall have duly issued against any defendant for contempt in not answering the bill, and such defendant shall not have been taken under such writ, and the sheriff of the county into which such writ shall have issued, shall make a return of *non est inventus* to the same, the court shall, upon motion by or on behalf of the plaintiff (notice of which shall not be required), order that the serjeant at arms attending the court, do apprehend such defendant, and bring him to the bar of the court to answer his contempt; and the same proceedings may thereupon be had as if such order had been made in the manner heretofore in use; provided, that before such order shall in any such case be made, the plaintiff applying for the same shall be required to satisfy the court by the affidavit of the solicitor of the plaintiff, or of his town agent, if the writ of attachment was issued by such town agent, that due diligence was used to ascertain the place where such defendant was at the time of issuing such writ, and in endeavoring to apprehend such defendant under the same; and that the person suing forth such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued."



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was by no means supplied by the statement, that at that time the defendant's last and only known place of abode was in the particular county into which the writ was issued. He therefore refused the motion.

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[\*93]

\*WRIGHT v. GREEN.(a)

1833: 25th, 26th and 28th January.

To ground an order for the serjeant-at-arms under the 1 W. 4, ch. 36, s. 13, rule 1, the affidavit need not state the party's *belief* that due diligence has been used in ascertaining the defendant's residence, and in endeavoring to apprehend him; but it must swear to those facts, and in some way or other satisfy the court of their truth.

SIR E. SUGDEN and Mr. *Spurrier*, moved that the defendant Green, who had been taken into custody by the serjeant at arms under the provisions of the 1 W. 4, c. 36, s. 15, might be discharged, on the ground that his commitment was irregular. The affidavit on which the order for the serjeant at arms proceeded, was sworn by the plaintiff's town agent, he having been the person by whom the writ of attachment was sued out. It stated, that due diligence had been used to ascertain the place where the defendant was at the time of issuing the writ, and in endeavoring to apprehend him under it: it also stated the agent's belief, that at the time the writ was sued out, the defendant was in the county into which the same was issued; and it set forth *verbatim* the copy of a letter which the defendant had received from the officer employed in executing the writ, and in which the particulars of two unsuccessful attempts to arrest the defendant were detailed in a rather confused and obscure way. The affidavit, moreover, swore to the agent's belief that the contents of the letter were true, but it did not state, in terms, that he believed that due diligence had been used in endeavoring to apprehend

(a) This case is inserted here in consequence of its connection with the questions discussed in *Handfield v. Wildes*.

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Wright v. Green.

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the defendant. The sheriff having made a return of *non est inventus* to the writ, the Vice-Chancellor, upon reading the affidavit above stated, considered it to be sufficient, and directed the serjeant at arms to go.

In support of the motion, it was insisted, that such an affidavit ought not to have satisfied the court. It was not [\*94] enough to swear that due diligence had been used, unless circumstances were detailed with respect to the execution of the attachment, proving that something more had been done than a mere formal compliance with the exigency of the statute. The agent should, at least, pledge his oath to his own belief, that all due diligence had been used. The statements in the letter, which was written by an illiterate person, could not be evidence, and were anything but clear and satisfactory. They were the statements of a man, interested in giving a favorable account of his own activity, in order to enhance his merits.

Mr. Rolfe and Mr. Stuart submitted that the agent had done everything prescribed by the rule, and everything which it was possible for him to do without going in person to the country, and accompanying the bailiff in his attempts to serve the attachment: and if that were to be required of the solicitor, the statute would soon be a dead letter. The agent could know nothing personally of the sheriff's officers, over whom he had no kind of control: and all, therefore, which the Act required was, that he should take care that the writ was properly sued out and sent down in due course to the sheriff, and that he should satisfy the court of that fact by his oath.

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THE LORD CHANCELLOR [after stating the circumstances of the case, and reading the words of the enactment.] In order to warrant the order, the court must be satisfied of these two facts; first, that due diligence has been used to ascertain the residence of the party; and, second, that due diligence has been used in endeavoring to apprehend him: and of this it can be satisfied in

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one way only, viz., by the affidavit of the plaintiff's [\*95] solicitor, who sued out the writ; or if it were sued out \*by the town agent, then by the affidavit of that agent, swearing to the facts. But it is necessary for the affidavit to *satisfy* the court; and whatever else it may contain, beyond the swearing to these naked facts, can only be brought forward with a view to affording the required satisfaction. It was contended that something more than this should be done, namely, that the party making the affidavit, should swear to his *belief* that due diligence had been used to ascertain the defendant's residence. But that is no part of the exigency of the rule; on the contrary, where the party's belief is required to be sworn to, as in the subsequent clause, with respect to the defendant being in the county into which the writ was issued at the time when it was sued forth, that is so stated in express terms; and the difference in the language of the two clauses, leaves no room for conjecturing what the intention of the legislature might have been.

The question then comes to be here, as it must be in every other case, whether the solicitor who has made affidavit to circumstances, though not within his own knowledge, and who has also complied with the exigency of the rule, in swearing to his belief that the defendant was in the county when the writ was sued forth, but who has not sworn, as he was not required, to his belief that due diligence was used—whether that solicitor has not disclosed circumstances sufficient in reason to satisfy the court that such diligence has really been used? The mode in which he has attempted to do so, is by setting forth in his affidavit a letter, received, as he swears, from the officer who endeavored to make the caption, and in which the writer relates a number of particulars, the whole of which, taken together, satisfied the court below, and I think correctly, that due diligence had been used: [\*96] and he swears, moreover, to his belief, that the \*contents of that letter are true. It is said, indeed, that the letter might have been more precise and particular in its statements; but I must look at the whole of the affidavit together: and, although I admit that it might have been more satisfactory, I am

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still disposed to think, that, standing as it does, quite uncontradicted, it ought to be deemed sufficient.

The case of *Miller v. Bennett*, with a note of which I have been furnished, turned upon circumstances entirely different. There was no question there, as to the propriety of the original order; but an application was made before the Vice-Chancellor to have it set aside, upon further affidavits, showing that the court had been imposed upon. In the present case, the motion is to discharge his Honor's order, on the ground of its having improperly issued in the first instance, and therefore I am not at liberty to take into view the affidavit subsequently made by the plaintiff's wife, contradicting the statements in the letter. The motion must be refused with costs.

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\*WEAVER v. MAULE.

[\*97]

ROLLS.—1830: 13th and 17th December.

Where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir.

A. being seised of a copyhold in fee, surrendered it to the use of B. and his heirs, according to the custom of the manor, but subject to the trusts of a certain indenture therein referred to; these trusts were, after giving one year's previous notice, to sell the tenement; to retain out of the proceeds of the sale a sum of 700*l.* and interest, for which the surrender was a security, and to pay the overplus to A.; B. was admitted, and died intestate and without an heir, the 700*l.*, with an arrear of interest, still remaining due to him:

Held, that the lord did not become entitled to the tenement by reason of failure of heirs of B., and that A. had a right to redeem the premises, and, upon payment of what was due on the mortgage, to be re-admitted as tenant in fee according to the custom of the manor:

That it was the personal representative of B., and not the lord, who was entitled to receive the mortgage debt.

THE plaintiff, being seised to him and his heirs of a certain tenement according to the custom of the manor of Taunton Dean

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in the county of Somerset, borrowed the sum of 700*l.* of one John Ball, and for securing the repayment of the same, he, on the 12th of May, 1824, duly surrendered the tenement into the hands of the lord of the manor, to the use and behoof of John Ball and his heirs and assigns forever, according to the custom of the manor, subject, nevertheless, to the trusts, declarations, and agreements mentioned and contained of and concerning the tenements, in a certain indenture, bearing even date with the surrender, and made between the plaintiff of the one part, and John Ball of the other part. Upon this surrender John Ball was duly admitted. By the indenture therein referred to, it was agreed between the plaintiff and John Ball, that the tenement should be held and enjoyed by Ball, his heirs and assigns, according to the custom of the manor, upon trust that Ball, his heirs and assigns, might at any time, after giving one year's previous notice in manner therein mentioned, sell and dispose of the tenement, and by and out of the moneys arising from such sale, and the rents and profits of the premises in the meantime, [\*98] in the first place pay and discharge all rates, taxes and lord's rents, and all expenses to be incurred in keeping the premises in repair, and in assuring the same against fire, and all expenses incurred in the sale, and should, in the next place, pay off and discharge the sum of 700*l.*, and all interest due thereon, and should pay over the surplus moneys, if any, to the plaintiff, his executors, administrators, and assigns.

In the month of August, 1825, John Ball died intestate and without an heir; administration of his personal estate and effects was granted to the defendant George Maule, on the nomination of the crown.

The mortgage premises had not been sold, nor had any notice been given by Ball, in his lifetime, of an intention to sell them, and at his death the sum of 700*l.*, with an arrear of interest, remained due to him. Soon after the death of John Ball, William Kinglake, the lord of the manor of Taunton Dean, caused proclamation to be made at three several courts for the heir of

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John Ball to come in to be admitted to the tenement; and, no heir having appeared, he issued a warrant of seisin of the tenement, claiming to be entitled to the same by reason of the failure of heirs of John Ball. The plaintiff then filed the present bill against William Kinglake and George Maule, praying to have it declared that he was entitled to the equity of redemption of the copyhold tenement.

There were two questions in the cause.

I. Whether, under the circumstances, the plaintiff had an equity of redemption as against the lord, and was entitled, upon payment of the 700*l.* and interest, to be re-admitted to the copyhold tenement.

\*II. If the mortgagor had a right to redeem, who [\*99] was entitled to receive the mortgage money; the lord, or the personal representative of the mortgagee.

Mr. *Bickersteth* and Mr. *Jacob*, for the plaintiff.

Mr. *Tinney* and Mr. *B. Parry*, for the lord of the manor.

For the plaintiff it was argued that this, though in form a trust for sale, was substantially a mortgage; and that, as in the analogous instance of freehold estate escheated to the crown, the lord must take the property subject to the rights of the mortgagor; and the same rule applied if the conveyance were considered as a trust; *Paulet's Case*, (a) *Attorney General v. Reeve*, (b) It was clear from the judgment of Lord Mansfield and Sir Thomas Clarke in *Burgess v. Wheate*, (c) that a mortgage escheats, subject to the equity of redemption, and that the mortgage money must be paid to the personal representative of the mortgagee; *Attorney-General v. Henchman*, (d) If the circumstance of the premises being copyhold created any difference, still the peculiar form

(a) Hard. 465.

(b) 2 Atk. 223.

(c) 1 Ed. 177; 1 W. Black. 123.

(d) 2 Sim. & St. 498.

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of this surrender and admittance preserved the plaintiff's equity against the lord, and brought the case exactly within the principle of Lord Mansfield's observation, that if the lord "consents to a condition or trust on the court roll, then he is bound by it, for he cannot claim against his own act."<sup>(a)</sup>

On the other hand, it was contended, on behalf of Mr. Kinglake, that the conveyance was not a mortgage, but a trust for sale; and that, as the premises in question were of [\*100] copyhold tenure, the rules and decisions with \*respect to freeholds escheating to the crown had no application. It was a settled principle that the lord of a manor could not be affected by any trust to which he was not an assenting party; *Peachy v. Duke of Somerset*,<sup>(b)</sup> *Howard v. Bartlet*.<sup>(c)</sup> The entry of the trust upon the court rolls was the unauthorised act of the steward, unknown to the lord, who ought not therefore to be bound by it; especially as upon the recent cases it was extremely doubtful whether, if a tenant made an application for that purpose, the steward had any power or discretion to refuse compliance.<sup>(d)</sup>

Mr. Wray for the crown.

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**THE MASTER OF THE ROLLS:**—In the case of fee simple lands, the lord, taking by escheat, is subject to the charges and incumbrances of the tenant, because the tenant has full power to create them without the consent of the lord. But in the case of copyholds and customary freeholds, where the title depends upon admission, the lord, taking by escheat, is not subject to the charges and incumbrances, or alienation of the tenant, unless by act of admission he has expressly assented to them. In the present case the tenant surrenders the land into the hands of the lord, to the intent that a new tenant may be sub-

(a) 1 Eden, 232; *The King v. Haddenham*, 15 East, 463. 1 Watk. Copyh. 2d edition, 276.

(c) Hob. 181.

(b) 1 Strange, 447, vi. Vin. Ab. 123; (d) See 1 Watk. Copyh. 2d edition, 272, n.

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stituted in his place, subject to the trusts, declarations and agreements expressed in a certain indenture, referred to in the surrender; and when the lord admits the new tenant upon such surrender, he is to be considered as thereby assenting to the qualified nature of his tenure, and cannot afterwards claim against those trusts, declarations and agreements to which he has thus given his consent. \*Whether he were, or [\*101] were not, actually acquainted with the nature of the trusts and agreements contained in the indenture, is immaterial. The terms of the surrender gave him full notice of the trusts, and it was his duty to inform himself of their nature.

The lord, in this case, therefore, being to be considered as bound by the trusts of the indenture, becomes himself a trustee for the purpose therein mentioned, and the plaintiff, as against the lord, is entitled to the usual decree to redeem, inasmuch as the equity of redemption still subsists under the indenture, no notice having been ever given by the mortgagee, so as to acquire the right of exercising the power of sale.

The question remains between the lord and the defendant, the personal representative of John Ball, which of them is to receive the money to be paid by the plaintiff upon the redemption. The lord, having by his admission upon the surrender consented to the mortgage, it follows that the mortgage money is part of the personal estate of the mortgagee, and is to be received by his administrator.

The decree must, therefore, be to continue the injunction restraining the lord from all further proceeding at law, to recover possession of the customary tenement; to declare that the plaintiff is entitled to redeem as against both defendants; to direct the usual account of what is due upon the mortgage, and that, upon payment of what shall be so found due to the defendant, the administrator of Ball, the lord do regrant the tenement to the plaintiff, to be held to him and his heirs, according to the custom of the manor, as upon his former admission, he paying to the lord,



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or his steward, the fine and fees due upon his admission. Considering the novelty of the case, let the decree be without costs.

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[\*102]

\*GRONOW v. EDWARDS.

ROLLS.—1830: 21st December.

A modus payable by every householder, in lieu of all tithes of hay, without regard to the fact whether such householder has or has not hay, is valid, but otherwise if it be alleged to be payable only when the householder has hay.

Sixpence in lieu of a tithe pig is rank: a modus for fruit and garden stuff is good, though it be not alleged to be growing in a garden.

THIS was a bill by the vicar of the parish of Cadoxton-juxta-Neath, in the county of Glamorgan, against the defendant, who was an occupier of lands within a particular district of that parish, and was also entitled to the rectorial tithes in that district.

The principal question respected the tithe of hay. The defendant, in his answer, insisted upon a modus to the effect following: "Every householder inhabiting within the parish is to pay, for and in lieu of the tithe of all hay made and carried on or from any of the lands within the said parish, in the tenure of each occupier, be the quantity great or small, as well for two or more farms or tenements as for one, the annual sum of one penny," &c. And in a subsequent part of his answer he used the following words: "That the sum of one penny hath, as he believes, from time immemorial been paid to and received by the vicar of the said parish for the time being, for or in lieu of the tithe of all hay whatever, made and carried by each of the occupiers of the lands within such parish, upon and from off the said several lands."

Mr. Agar, Mr. Duckworth, and Mr. Hunt, for the plaintiff.

This modus is not alleged with sufficient clearness and precision. It leaves the vicar in doubt whether this customary

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payment is to be received from every householder within the parish, or from every householder who occupies lands within the parish, or from every householder occupying lands on which there is \*hay. In substance the modus stated is [\*103] a payment of one penny by each householder inhabiting within the parish, in lieu of the tithes of hay grown on lands occupied by him. Such a modus is void, because it is uncertain, and liable to changes and fluctuations which may altogether annihilate it as a provision for the vicar. If the lands on which hay is grown are in the occupation of one hundred persons this year, and of only one person in the next, the vicar will receive in the one case one hundred pennies, and in the other a single penny only. On this principle, in *Blackburn v. Jepson*,<sup>(a)</sup> a modus of one penny in lieu of the tithe of hay of every inhabitant or occupier of a house, and having any land at or belonging to, or used or enjoyed with any house, was held, by Lord Eldon, to be invalid. In *Travis v. Oxtou*,<sup>(b)</sup> the defence set up to a claim of tithe of hay, was an ancient usage to pay a penny for every house having lands belonging to it, without specification or regard to quantity; the Court of Exchequer held that such a modus could not be supported, because it was a recompense for tithe wholly uncertain, fluctuating in its amount, shifting according to the changes in the occupation of lands, and liable to be reduced to a single penny, if not to be wholly annihilated: and the House of Lords, upon appeal, sanctioned this doctrine. In *Busk v. Lewis*,<sup>(c)</sup> a modus of one penny payable by every occupier of land, in lieu of tithe of hay, was held to be bad.

There is a case of *Bennett v. Read*,<sup>(d)</sup> which has sometimes been cited as proving that a modus may be good, though liable to the objection now raised. Lord \*Eldon<sup>(e)</sup> con- [\*104] sidered that, in *Bennett v. Read*, if an occupier parted with the land and retained the house, he was liable to pay: so

• (a) 17 Ves. 473, and 3 Swans. 132.

(c) Jac. 363.

(b) 3 Wood. 523; 3 Gwill. 1666; 1 Anstr. 308, n., under the name of *Whitehead v. Travis*, 7 Bro. P. C. ed. Toml. 49.

(d) 4 Gwill. 1272; 1 Anst. 322, n.

(e) 3 Swans. 156.

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that the customary payment was due from every occupier of a house, whether he held the land along with it or not, and therefore could not be affected by the consolidation of the lands in the hands of a few individuals, though it might vary with the number of inhabitants. But if the doctrine of *Bennett v. Read* be different from that laid down in *Travis v. Oxton*, the latter, as Lord Eldon has distinctly stated, must prevail, since it is the authority of the House of Lords.(a)

Mr. *Bickersteth* and Mr. *Tennant*, for the defendant.

*Bennett v. Read* is a case of the highest authority: it was most elaborately argued by counsel of great name, among whom were Mr. Serjeant Hill and the late Lord Redesdale, and it was most solemnly decided by very able Judges. There the modus was "That every person being a householder inhabitant within the parish, and occupying a messuage, cottage, garden, orchard, yard, land, meadow, pasture, or marsh ground, within the same, has, from time whereof the memory of man runneth not to the contrary, paid, and been used and accustomed, and of right ought to pay to the vicar of the said parish, for the time being, the sum of 2*d.* at the feast of Easter, &c., in lieu and full satisfaction of all and singular the tithe of herbs, roots, flowers, apples, pears, ~~nuts~~, and other fruits, in or upon any garden, orchard, or yard, occupied by such person within the parish; yearly growing, arising and renewing, and of all wood, cuttings, toppings, and croppings of trees, cut in such year upon land occupied by such person within the parish; and of all herbage and agistment of barren and unprofitable cattle kept, fed, and depastured by [\*105] such \*person in the parish in such year." In *Bennett v. Read* the payment was by every person being a householder inhabitant, in lieu of tithes of herbs, &c., growing in any garden occupied by him: here is a payment by every householder inhabitant in lieu of the tithe of hay on lands in the tenure of each occupier, that is to say, in the tenure of such inhabitan

(a) 3 Swans, 15.

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Gronow v. Edwards.

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householder. There is no substantial difference between the two cases. Looking at the words in which the modus is laid in *Bennett v. Read*, it is not easy to see how the payment could be considered as attaching upon every inhabitant householder, whether he occupied any garden or not, since it is expressly stated to be in lieu of herbs, &c., in any garden, &c., occupied by such person. But if the words used there admitted of such a construction, it is an express authority for saying that the words used here may receive a similar interpretation, and are a sufficient allegation of a modus valid in law. Moduses, not unlike the present, were established in *Hockmore v. Richards*.(a)\*

\*THE MASTER OF THE ROLLS.—If this modus had been [\*106] distinctly pleaded as payable by every householder within the parish in lieu of the tithe of hay, without regard to the fact, whether such householder had or had not hay, then, whatever I might have thought of such a modus, if the point had been unprejudiced by decision, I should have been bound by the case of *Bennett v. Read*,(a) the authority of which is not denied by Lord Eldon, in *Blackburn v. Jepson*,(b) to have declared that the modus was valid. Those who set up a modus against the acknowledged right of the vicar to the tithe of a particular article, are bound to state with certainty the nature of the modus. I

(a) 1 Wood, 485.

\* It is clear, from the language of Baron Eyre, that his judgment in *Bennett v. Read*, proceeded on the ground that the customary payment was due from every householder, whether occupying land or not. "There is," says he, (4 Gwill 1290,) "this inequality in this modus, that a mere inhabitant householder, without a foot of land, pays as much as the inhabitant householder who occupies the largest farm in the parish; and there is this appearance of its being unreasonable, that the mere inhabitant householder seems to pay for tithes where he has not all the tithable matters for which his payment is a satisfaction." Again, "The inhabitant householders have entered into a composition with the vicar of these tithes for a money payment, rated upon them in their character of inhabitant householders, with perfect equality." In another part of his judgment he says, "Here there is a fixed and certain recompense (for so we have held the payment of 2d. by the name of *hearth silver*, &c., by every inhabitant householder to be), for all the tithes of the particular species due from all the inhabitant householders within the district."

(b) 4 Gwill. 1272.

(c) 3 Swanst. 132.

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Attorney-General v. Sibthorp.

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cannot collect with certainty here that the defendant means to assert, that the householder is to pay the modus, without regard to the fact, whether he has or has not hay: and indeed his own counsel give a different construction to his allegations, and consider that no tithe is payable by the householder unless he has hay. In such circumstances the vicar is entitled to a decree for the tithe of hay in kind.

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Another modus insisted on was the following: "to pay for pigs, whether few or many, one pig for tithe in kind or 6d. in lieu thereof."

THE MASTER OF THE ROLLS held that this modus was bad; 6d. in lieu of a tithe pig being rank.

He also held, that a modus of one penny for fruit and garden stuff was good, though not pleaded to be for fruit and garden stuff growing in a garden.

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[\*107]

\*ATTORNEY-GENERAL v. SIBTHORP.

1830: 14th and 22d December.

Conditional bequest, "to the fellows and demies of Magdalen College, Oxford," upon the happening of a particular event, held void for uncertainty; the language of the condition, and the description of the legatees being so loose and obscure, that the court was unable judicially to collect the intention of the testator with respect either to the individuals who were to take, or the time and manner of their taking.

DR. SIBTHORP by his will, bearing date the 21st of July, 1797, and duly executed, devised all his estates in several counties, which he enumerated, and also his ground and fee farm rents to his son, Humphrey Sibthorp, for life, without impeachment of waste, remainder to trustees, to preserve contingent remainders;

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remainder, after the decease of Humphrey Sibthorp, to his first and other sons successively in tail male, with divers remainders over. The testator then made certain devises and bequests for the benefit of his daughters, Lady Sewell and Mrs. Cholmeley, and their families, and proceeded in these words: "And whereas the quay at Instow, and several cellars and warehouses, and houses adjoining, built on the premises, together with the pottery, and altogether in the parish of Instow and Fremington, I hereby bequeath to my son Humphrey Sibthorp, conditioned of his bringing up one of his sons into a mercantile line, under such merchants in any capital trading place, London, Liverpool, Hull, Bristol, &c.; or in default of such, should my son Cholmeley prefer such a situation to any of his sons, as within two years after my decease should be determined upon and required by one or more of the above said trustees of my son Humphrey Sibthorp, who are hereby required to receive the profits of the said estates in the respective parishes at Instow and Fremington, towards defraying the expenses of such appointment for the mercantile line, apprehended as suitable and commodious as any in the West of England for trade in general; providing for either not less than the sum of 500*l.*, for the clerkship or apprenticeship, and at the age of twenty-three years the net sum \*of 400*l.* payable at the four quarterly days, Midsummer, Christmas, Lady-day, and Michaelmas, 100*l.* each quarter for embarking into such a mercantile line of merchandize, as in the opinion and recommendation of the aforesaid trustees, or majority, in concert with their respective parents, if living, or assigns, which trustees are hereby likewise empowered as well as their assigns, for the preservation of the contingent uses, herein noticed and specified, from being defeated and destroyed, and for that purpose to make entries or bring actions, as the case requires, on the estate at South Leigh, for the due performance of establishing of such a mercantile line as either, first, in the option of my son Humphrey Sibthorp, and on his refusal, of my son Montague Cholmeley; if declined by both, after due notice given to each within two years after my decease, as required of one or more of the above trustees, by the parents or

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Attorney-General v. Sibthorp.

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guardians of such children, my will and order is, that the above limited sums should be claimed and paid for the above limited term of three years, viz., 100*l.* quarterly, as well as 500*l.*, to the fellows and demies of Magdalen College, Oxford, who, in default of non-performance, I hereby will shall have an equal right with the above trustees to preserve the contingent uses, hereby thus limited, from being defeated or destroyed: and further, for the establishment of such son as shall *bona fide* engage in the mercantile line, my request and will is, my estate of Fullincot, with its appendage, together with the quay and several warehouses, heretofore employed, shall be granted on a lease during the life and residence of whatever grandson may be fixed for the above purpose, together with the manorial rights and privileges of the manor, as his residence and occupancy, at least six months every year, determinable on the decease of such grandson, [\*109] unless \*such should leave male issue lawfully begotten, and bring up such son in the mercantile line, when my will is, the like should enjoy and possess the aforesaid Fullincot and appurtenances, the quay, warehouses and manorial rights and privileges, as hereby granted to his father under the like limitations; otherwise the whole to fall into the possession of my right heirs." The testator appointed his son, Humphrey Sibthorp, to be his executor and residuary legatee.

The testator died soon after the execution of his will. Humphrey Sibthorp the son died in the year 1815, leaving the defendant, C. W. Sibthorp, his eldest son and heir at law.

The suit was instituted by the president and fellows of Magdalen College, Oxford, against the devisee and personal representative of Humphrey Sibthorp; alleging that inasmuch as neither Sibthorp nor Cholmeley had availed himself of the option to bring up a son in the mercantile line, the contingent legacies payable in that event had failed, and that the gift over to the fellows and demies of Magdalen College took effect. When the cause first came on, the Vice-Chancellor referred it to the Master, to inquire whether there was any corporate body in Magdalen

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Attorney-General v. Sibthorp.

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College, Oxford, answering the description of fellows and demies; and if not, what was the constitution of the college, and who were its component members. The Master reported that there was no corporate body in Magdalen College answering that description, but that the corporate name and style of the college was "The President and Scholars of St. Mary Magdalen College, in the University of Oxford," and that its component members were a president, forty fellows, thirty scholars called demies, a steward, four chaplains, eight lay clerks, an organist, sixteen choristers, \*a schoolmaster, an usher, a manciple, [\*110] two cooks, a page, and two porters.

At the hearing on further directions, Sir J. Leach, then Vice-Chancellor, decreed that the legacy of 500*l.*, and the three several legacies of 400*l.*, bequeathed by the testator's will, were intended by him for the permanent benefit of the fellows and demies of Magdalen College, Oxford, and that those several sums, with interest, should be paid by the defendant to the plaintiffs.

This decree having been brought by appeal before the Lord Chancellor Eldon, his Lordship was of opinion that inasmuch as the devise, if it were to a corporation, would be void by the statute of wills, and might still be supported as a good appointment to a charity, the Attorney-General ought to have been made a party ;(a) and the record having been amended in that view, so as to assume the form of an information and bill, the appeal petition was again brought on and argued, but Lord Eldon resigned office without having delivered judgment.

The *Solicitor-General*, Mr. *Preston*, and Mr. *Abbott* for the appeal.

It is impossible to put a rational construction upon so confused and contradictory a clause, which must therefore be void for uncertainty. If however the words can amount to a bequest at

(a) 1 Russ. 154.



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Attorney-General v. Ribthorp.

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all, the next question is in whose favor the bequest is made—whether to the plaintiffs in their collegiate character, or whether, as was originally supposed, to the members of the college as private individuals. If it extends to the whole college [\*111] as a body, \*no less than 100 persons would, according to the finding of the master, be entitled to share in the benefit of the legacy, the annual amount of which, if distributed rateably among such a number, could not exceed a few shillings annually to each. This, besides, is not the devise of a rent charge, but a pecuniary legacy given as a gross sum, and it would be doing violence to the language of the will, no less than to probability, to treat it as a gift in perpetuity. If, on the other hand (which is the more natural supposition), the legacy was intended as a personal bounty to the fellows and demies of the college, and not to them and their successors in all time to come, the case stands quite untouched by the *Attorney-General* [\*112] v. *Tancred*; (a) for it must then be confined \*to the indi-

a) 1 Ed. 10; Amb. 351. Some doubt having been suggested with respect to the accuracy of the report, the Lord Chancellor directed the Registrar's book to be examined, when it was found that the devise over ran thus: "Provided, that if the Act for preventing the disposition of lands, whereby the same become inalienable, should impede the premises devised to the said twelve students and twelve pensioners from taking effect, then and not otherwise he devised all the said premises to the said thirteen fellows of Christ's College, and the said fellows of Gonville and Caius College, and the scholars of both colleges, each fellow to have a double proportion of the said rents and profits to every scholar." . . . . . In a subsequent part of the will, the testator nominated his housekeeper, Elizabeth Tottenham, his sole executrix and residuary legatee; but in case she died before him (which was the fact), "he appointed the Master of Christ's College for the time being his executor; and the said master and fellows of Christ's College, who should happen to be master and fellows at the time of his death, his joint residuary legatees." Reg. Lib. A. 1757, fol. 75.

It will be observed, that the payment of the rents and profits directed, by way of substitution, in the event of the devise for the benefit of the Tancred students and pensioners being void by the Statute of Charitable Uses, is to the thirteen fellows of Christ's College, and the fellows of Gonville and Caius College, and the scholars of both colleges generally, and is not confined to such as answered that description at the time of the testator's death. That qualification is annexed to the master and fellows of Christ's College, only in their character of residuary legatees. The statement of the case in 1 Eden, 10 (as well as the marginal note), is therefore incorrect.

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viduals who answered the description at the time when the testator died; and as they or their representatives are not before the court, there is a fatal defect of parties. In the *Attorney-General v. Tancred*, the subject of the gift was a freehold estate devised in fee, from the annual rents and profits of which a perpetual income would naturally arise; and in the words of the devise itself, the college was correctly designated by its corporate name. It appears from the defendant's answer, which has not been replied to, that Humphrey Sibthorp signified his intention of bringing up his youngest son, Richard, in the mercantile line, although that intention was afterwards abandoned. How then can it be said with certainty, that he did not acquire such an interest as entitled him to claim the 500*l.* legacy? The three legacies of 400*l.* each, were void for remoteness; for they are given to any son of Humphrey Sibthorp, or of Montague Cholmely, at his age of twenty three, although *non constant* that such son would be in *esse* at the death of the testator; *Jee v. Audley*, (a) *Proctor v. Bishop of Bath and Wells*, (b) *Leake v. Robinson*. (c) The plaintiffs claim as legatees only by way of substitution, on the ground of the prior legatees having forfeited their interest by allowing the two years to elapse without any nomination being made. But in order to vest a title in the plaintiffs, it was necessary that something should be done previously; for the condition is precedent, and being one of forfeiture must be strictly performed; *Baske's Case*. (d) Notice was to be given by the trustees to the parents, and it was only upon such notice, and a refusal \*by the latter, that the right of the college [\*118] was to accrue. Now it is not stated or pretended that such a notice was ever given.

Mr. Wakefield, for the plaintiffs.

The original decree was pronounced in 1818, and no defect of parties was then suggested. The Master made his report, which was regularly confirmed, and when the cause was heard on fur-

(a) 1 Cox, 324.

(b) 2 H. Blacks. 358.

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(c) 2 Mer. 363.

(d) 2 Mod. 200.

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ther directions, on that second hearing, no such objection was started, the court and all parties proceeding on the assumption, that if the legacy were good, it could only be supported as a gift in perpetuity to a charity. Lord Eldon's impression was the same, when he directed the cause to stand over for the purpose of amending the record; and it is too late now to set up the objection.

On the construction of the will, it is clear that a legacy is here given to certain individuals upon a certain specified event; and those individuals are sufficiently described to leave no rational doubt, either as to the persons who are to take, or the manner of their taking. The gift is to a class, the individuals composing which were continually fluctuating, and might vary indefinitely before the will could come into operation; a circumstance inconsistent with the notion that a special bounty was intended to any particular members of the college. This case is ruled by the *Attorney-General v. Tancred*, in which, for the purposes of Lord Northington's judgment, the insertion or omission of the words "living at the testator's death" is quite immaterial. Upon the authority of that case, the gift to the fellows and demies of Magdalen College must be construed as a charitable bequest to the college, which that body will of course apply as they in [\*114] their discretion may think \*best, for the general benefit of the society. It is not incumbent on them to share the legacy in minute fractions among all the persons actually composing the corporation; but if it were, the gift would still be supported as a bequest to the college in trust for the benefit of the particular members, upon the principles laid down by Lord Northington in the *Attorney-General v. Tancred*, and approved by Sir W. Grant in the *Attorney-General v. Munby*, (a) and the smallness of the legacy, in point of value, would form no argument against its validity. The bequest in virtue of which oysters are supplied to certain messes in Lincoln's Inn Hall on the first day of term is an instance of a charitable gift more insignificant

(a) 1 Mer. 327.

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in amount, and much less rational in its nature. The contingency was not too remote, for it must have been determined at the end of two years after the testator's death.\* The language of the clause as to notice is not very precise, but in substance the condition has been complied with. Both Sibthorp and Cholmeley were well aware of the provisions of the will, and the former must be presumed to have had formal notice, since he at first signified his intention of bringing up a son to trade. Eventually, neither of them thought fit to gratify the wishes of the testator in that point, and, as a consequence of their neglect, the limitation over, which imports a clear gift to the fellows and demies of Magdalen College, came into immediate operation, and amounted to a charitable legacy to them, for the benefit of the society generally. If formal notice were required to be given by the trustees, their laches would not be allowed in equity to prejudice or defeat the rights of third parties.

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\* *December 22d.* — THE LORD CHANCELLOR: — The [\*115] principal question in this cause, was whether a bequest in these terms — “to the fellows and demies of Magdalen College” — constituted such a description as would enable them to take in their corporate capacity, or as individuals designated by the testator to be the special objects of his bounty. The case is one of considerable difficulty, created chiefly by the very singular language of the will. The will is that of a person far advanced in years; and it would perhaps be impossible to find a more senseless and absurd collection of words than occurs in that part of it which relates to the legacy in question. These circumstances relieve my mind from much of the embarrassment I should otherwise have felt, in arriving at a satisfactory conclusion; for they are quite sufficient to bring into operation the well established principle upon which the court has always decided in favor of the heir, whenever the testator's intentions towards devisees or legatees cannot be distinctly ascertained.

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In support of the validity of the bequest as a gift in perpetuity to a charity, the authority of the *Attorney-General v. Tancred* was strongly relied upon by the plaintiffs; but, on reference to the Registrar's book, that case will be found to be incorrectly stated in the report of Lord Northampton's decisions, and the error has been since copied into Ambler, where, after the devise to the fellows of Christ's, and of Gonville and Caius, and the scholars of both colleges, the late editor has inserted, borrowing them from Lord Henley's report, the words "living at his (the testator's) death," for which there is no warrant in the will, as it appears upon the pleadings. The mistake has been caused by confounding that devise with another passage occurring in a subsequent part [\*116] of the same will, whereby the master and fellows of Christ's College, at the time of the testator's death, are nominated his joint residuary legatees. The case of the *Attorney-General v. Tancred*, therefore, will remain untouched by any judgment I may pronounce upon the instrument now before me.

Looking at the whole of the circumstances of this case, I think it would be straining too much in support of the bequest, if I were to hold that the legatees were intended to take these sums as a perpetual gift to them and their successors. On calculating the probable value of the legacy, I find that, although, if the testator intended it as a memorial of kindness to his old college friends and acquaintance, it might, perhaps, amount to 15*l.* or 20*l.* to each of them, yet, if it was to be divided among the body of the college, as a charitable gift, it could not be worth more in annual value than from 15*s.* to 18*s.* apiece. If it be possible, therefore, to assign any rational intention to a bequest so extraordinary and irrational, the probability is, that the testator meant the legacy to vest not in the college collectively, but in those individual members who should be alive at the time of his decease. This, however, is little more than conjecture, and I have already observed, that, upon the principles of former decisions, it is impossible to support such a bequest. The judgment of the court below must be reversed.

Monypenny v. Bristow.

\*MONYPENNY v. BRISTOW.

[\*117]

ROLLS.—1830: 21st December.—L. C. 1831: 16th and 18th November. 1832: 25th January.

The rule of law that the title to land cannot be tried in an action for money had and received, does not apply to cases where only the past-gone rents of lands are in question.

Where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, it has not the effect of republishing that will, so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital.

The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held,

That the suit was maintainable for the rents received during her continuance in possession;

That, as the defence of the Statute of Limitations was not raised upon the pleadings, the account should be taken from the time when the plaintiff's title first accrued; and

That the plaintiff was not at liberty to set off the amount of such rents against payments made by the widow in her character of executrix, those payments being, by virtue of a special trust, a primary charge upon the estates, of which, subject to the widow's life interest, the plaintiff was devisee.

JAMES MONYPENNY by will, bearing date the 11th of February, 1804, and duly attested, after confirming his marriage settlement, whereby certain lands were settled on his wife for her jointure, gave and devised to his said wife, as a further provision, certain lands in the parishes of C. and T. for her life: he then gave and devised certain other lands in the parishes of G. and M. to his brother Thomas Monypenny for life, with remainder to the second son of the said Thomas for life, and to his first and every other son in tail; and he devised certain other lands in C. unto his brother Robert Monypenny for life, with remainder to the son of the said Robert for life, and to his first and every other son in tail; and he gave and devised his house,

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called Maytham Hall, and the rest, residue, and remainder of his real estate whatsoever, in possession, reversion, remainder, and expectancy, except as before devised, unto his brothers  
 [\*118] Phillips Monypenny, Robert Monypenny, \*and Thomas Monypenny, and their heirs, upon trust, within six months after his decease, to sell or dispose of so much of his said last devised estates as should be sufficient to pay off and discharge all his just debts and legacies, and also his funeral and testamentary expenses, it being his express will and desire that his personal estate should be wholly freed and discharged from all payments and demands whatsoever; and subject thereto, he devised the same to his brother, Phillips Monypenny, for life, with remainder to his first and every other son successively, in tail male, with divers remainders over; and he gave, devised, and bequeathed to his said brother Phillips Monypenny, his heirs, executors, and administrators, all his real, copyhold, and leasehold estates in or near the town of Birmingham, and in the parish of Hackney.

The testator, by a codicil bearing date the 25th July, 1818, which was duly executed and attested, and which he declared to be a codicil to his will, and desired might be taken as a part thereof, after reciting the devise which by his will he had made of the lands in the parishes of C. and T. to his wife for life, continued as follows: "And whereas I am desirous of making a more liberal provision for my said wife, and that she may enjoy the whole of my lands, tenements, and real estates for the term of her natural life, and take my personal estate absolutely, now, therefore, I do hereby confirm the said hereinbefore recited devise; and I do further give and devise unto my said wife, during her life, all those my lands, &c., in the parishes of G. and M., and also all those my lands, &c., in C. aforesaid" (which the testator recited he had by his said will devised to his brothers Thomas and Robert, and their children respectively); "and I direct that the estate for life, hereby devised to my said  
 [\*119] wife in my said lands, \*and situated in the several parishes of G., M., and C., shall vest in possession immedi-

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Monypenny v. Bristow.

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ately after my decease, and take precedence of the several estates thereof respectively devised or limited by my said will." The testator then, after the decease of his wife, gave and devised the said lands, &c., so thereby devised to her for life, to such and the same persons, for such and the same estates, and upon such and the same trusts respectively, as would have taken the same by virtue of his said will; and after reciting, that by his said will he had given and devised his house called Maytham Hall, and also all the rest, residue, and remainder of his real estate whatsoever, in possession, reversion, remainder, or expectancy, except as before devised, unto his three brothers and their heirs upon trusts therein expressed, he revoked the said last-recited devise; and thereby gave and devised his house called Maytham Hall, and all other his real estate whatsoever which he had by his said will devised to his said three brothers upon the trusts therein mentioned, unto Robert Monypenny, William Forbes, C. Willis, the elder, and C. Willis, the younger (whom he also named his executors), and their heirs, upon trust, after his decease, to sell and dispose of such parts thereof as might be necessary for raising and paying his debts, legacies, funeral and testamentary expenses, and the expenses of their executorship, it being his express will and desire that his said real estate should alone stand charged therewith, and that his personal estate should be freed and discharged therefrom; and subject thereto, upon trust for his said wife during her life, and after her decease upon such and the same trusts as were declared of the real estate by his said will devised to the said Phillips Monypenny, Thomas Monypenny, and Robert Monypenny, and their heirs by his said will, immediately subsequent to the power of sale in that behalf contained. \*The [\*120] will then proceeded thus: "And whereas by my said will I have given, devised, and bequeathed to my said brother, Phillips Monypenny, his heirs, executors, and administrators, all and every my real, copyhold, and leasehold estates in or near the town of Birmingham, and in the parish of Hackney; now I do hereby revoke the same devise and bequest, and do hereby give, devise, and bequeath all and every my said estate, so given



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to the said Phillips Monypenny as hereinbefore lastly recited, unto my said wife for the term of her natural life; and immediately after the decease of my said wife, I give and devise the same unto my brother Phillips Monypenny, his heirs, executors, and administrators, absolutely for ever."

In a subsequent part of the same codicil the personal estate was given to Mrs. Monypenny, clear of debts and legacies; and it was provided that whatever debts and legacies she paid, should be repaid to her with interest, by sale of a sufficient portion of the real estate charged therewith. By an unattested codicil of later date, she was nominated an executrix of the will, to act in conjunction with the executors already appointed.

Subsequently to the execution of the will, but prior to the date of the first codicil, the testator acquired two freehold houses in Birmingham; and on the 3d of June, 1822, he died, leaving the said Phillips Monypenny, his heir at law, and his widow, Mary Monypenny, surviving. The trustees and executors, with the exception of Robert Monypenny, executed a disclaimer of the trusts, and also renounced probate of the will. The will and codicils were proved by the widow alone; and upon the notion, which all parties appear to have entertained, that under the devise in the first codicil Mrs. Monypenny took a life interest in the whole of the testator's real property, she obtained [\*121] the \*custody of the title deeds, and was let into possession of all the real estates, including those charged with the payment of the debts and legacies, and the two after-purchased tenements in Birmingham, and she continued, with the full knowledge of the heir at law, in the undisturbed possession and enjoyment of those estates as long as she lived. On the 5th of December, 1826, Mrs. Monypenny died, having paid debts and legacies to a large amount, which had not been repaid to her at her death.

The amended bill was filed on the 4th of December, 1829, by Phillips Monypenny, the heir at law, and Robert Mony-

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penny, the sole acting trustee, and also the executor of the testator, against her personal representative; and it prayed, among other things, that the title deeds of the real estates subjected to the charge might be delivered up—that the testator might be declared to have died intestate with respect to the two after-purchased houses in Birmingham—that an account, might be taken of the rents and profits thereof during the time Mrs. Monypenny had continued in possession, and that the plaintiff, Phillips Monypenny, might be at liberty to set off against what should be found due from the defendant on that account, certain sums of money which the bill stated to be due from the plaintiff to the estate of Mrs. Monypenny, in respect of her disbursements as the executrix of her husband, the plaintiff submitting, that if upon the result of the account a balance should be found due to the defendant, a sufficient sum for the payment thereof should be raised by sale or mortgage of a portion of the real estates charged. The answer of the defendant did not set up the Statute of Limitations as a bar to any part of the demand.

*Mr. Pemberton and Mr. Barber* for the plaintiff.

\**Mr. Tinney and Mr. Goodeve* for the defendant. [\*122]

The first point argued was, whether, under the words of the will and codicil, Mrs. Monypenny was entitled to the rents of the houses at Birmingham during her life.

THE MASTER OF THE ROLLS decided that the houses at Birmingham did not pass to Mrs. Monypenny.

It was then argued for the defendant that, as Mrs. Monypenny had been let into possession, and had continued during her whole life in the peaceable receipt of the rents of the houses in question, under a mistake into which all parties innocently fell; and as those rents had been paid to her with the assent and approbation of the plaintiff, the latter was not now entitled to be relieved against the consequences of his own error, more

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especially in a case where he had every means of informing himself of his rights, and the error was purely one of law; *Bilbie v. Lumley*,<sup>(a)</sup> *Brisbane v. Dacres*,<sup>(b)</sup> *Skyring v. Greenwood*,<sup>(c)</sup> *Andrew v. Hancock*,<sup>(d)</sup> *Bramston v. Robins*.<sup>(e)</sup> It was farther contended, that these rents being wrongfully received by Mrs. Monypenny, could have been recovered in her lifetime only by an action of trespass, and that this action, being founded in *tort*, died with her, so that the rents were no longer recoverable by the plaintiff. And further, it was said, that although in some cases the action of trespass might be waived, and the action for money had and received adopted, that could not be the case where the title of the land came into question, as it did here, inasmuch as the plaintiff by his bill submitted that [\*123] point to the judgment of the court. In support of this proposition, the cases of *Cunningham v. Laurents*,<sup>(g)</sup> *Newton v. Graham*,<sup>(h)</sup> and *Marshall v. Hopkins*,<sup>(i)</sup> were cited. The defendant also insisted, that if the plaintiff was entitled in this suit to claim any part of the rents of the Birmingham houses received by Mrs. Monypenny, he could claim only such rents as were received by Mrs. Monypenny within six years from the filing of the amended bill which first raised the claim to them; for unless the plaintiff could by action at law have recovered them from the defendant, he could not recover them in equity.

For the plaintiff reliance was placed on *Hambly v. Trott*,<sup>(k)</sup> and *Pulleney v. Warren*.<sup>(l)</sup>

THE MASTER OF THE ROLLS:—The general principle which governs cases of this kind is stated in *Hambly v. Trott*.<sup>(m)</sup> In that case Lord Mansfield, after citing a case from Sir Thomas Raymond, in which an executor was held not to

(a) 2 East, 469.

(b) 5 Taunt. 141.

(c) 4 B. & C. 281.

(d) 1 Brod. & Bingh. 37.

(e) 4 Bing. 11.

(g) 1 Bac. Abr. 260, Gwill. edition.

(h) 10 B. & A. 234.

(i) 15 East, 309.

(k) Cowp. 371.

(l) 6 Ves. 72.

(m) Cowp. 371.

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be chargeable in *tort* for a wrong done by his testator, expresses himself in the following manner: "Sir Thomas Raymond adds, *vide Seville*, 40, a difference taken. That was the case of Sir Henry Sherrington, who had cut down trees upon the queen's land, and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, *Manwood*, Justice, said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies his executor shall be chargeable; but where the action is for damages only in satisfaction of \*the injury done, there his executor shall not be liable." [\*124]

These are the words Sir Thomas Raymond refers to.

Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall." Therefore, where the trespasser commits an injury, without benefit to himself, and dies, then the action dies with the person. But where the injury is attended with a profit to the trespasser, there the party may waive the *tort*, and bring an action of *assumpsit* against the executor for the value of the property taken by the trespasser.

It is truly said, that the title to land cannot be tried in an action for money had and received; but this is to be understood of cases where the present right to land is in question, and not cases where the question applies only to past-gone rents. If the plaintiff had proceeded against Mrs. Monypenny in her lifetime, and during her possession of the land, he could not have sustained the action for money had and received, but must have proceeded by ejectment, for there the title to the land would

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have been in question. This distinction governed the late case of *Pearce v. Day*,<sup>(a)</sup> before Lord Tenterden, where, [\*125] after the death of bankrupt, who had been \*tenant for life of certain property, his assignees recovered, in an action for money had and received, the past-gone rents of his life estate from a person who had received them under color of a fraudulent mortgage deed. An action for money had and received may be brought to recover the profits of an office, although the defendants set up a title to them.

I am of opinion, however, that the plaintiff cannot, upon the principle of set-off, claim to be allowed the amount of the rents thus received by Mrs. Monypenny against the demand of the defendant for the debts and legacies paid by that lady, because the sums which she has so paid do not form a personal demand against the plaintiff.

If an action at law had been brought by the plaintiff Monypenny against Bristow to recover these rents, and Bristow had not at law pleaded the Statute of Limitations, Monypenny would have recovered the full amount of the rents received beyond the six years: and as Mr. Bristow has not in this suit in equity set up the statute, the plaintiff is entitled here to the full amount of the rents received by Mrs. Monypenny.

1831: Nov. 16<sup>th</sup> and 18<sup>th</sup>.—The defendant appealed from so much of his Honor's decree as declared that the two houses in question did not pass to the widow by the first codicil, and that her representative was bound to account for the rents and profits thereof received by her in her lifetime.

Mr. Tinney and Mr. Goodeve, for the appellants.

The two houses at Birmingham passed to Mrs. Monypenny by virtue of the codicil of the 25<sup>th</sup> of July, 1818; the effect

(a) Tried at the London Sittings after Hilary Term, 1826.

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of which was to make the will speak as of \*that date, in [\*126] other words, to republish it on that day. The principle is, that a codicil amounts to a general republication, unless it contains something which, either by express words or plain implication, shows the testator's intention to restrict its operation to some specific purpose. *Pigott v. Waller*,(a) The doctrine of the courts is to favor republication.(b) It is not necessary that the codicil should contain any reference to the real estate; *Barnes v. Crowe*,(c) Nor will a devise by a codicil of part of a testator's after-purchased lands prevent other lands so purchased from passing under a general devise in the will. *Goodtitle v. Meredith*,(d) *Coppin v. Fernyhough*,(e) *Hulme v. Heygate*,(g) Sir W. Grant held, in *Rowley v. Eytton*,(h) that a codicil, by which certain lands were specifically devised, had the effect of republishing the will, so as to subject them to a general charge of debts contained in the will. There is nothing in this codicil which, either in terms or by implication, indicates a different intention on the part of the testator. On the contrary it was manifestly his purpose, and it was so understood and acquiesced in by all parties, that his widow should enjoy for her life the rents and profits of all his real estates. The recital in the commencement of the codicil indicates this purpose most unequivocally: if it stood alone, it would amount to a devise of all his property to her; and the language of the residuary clause, wherein, subject to a trust for debts and legacies, and subject to his widow's life interest, he devises Maytham Hall, and all the rest of his real estate whatsoever, to the plaintiff, in strict settlement, must be construed with reference to the recital, and cannot, without defeating the intent, be confined to those residuary estates exclusively, which \*the will had devised to his three brothers upon trust. [\*127] The case of *Bowes v. Bowes*,(i) on which the plaintiff will rely, turned upon the use of the word "said," which was

(a) 7 Ves. 98.

(b) 1 Vern. 330.

(c) 1 Ves. jun. 486.

(d) 2 M. &amp; S. 5.

(e) 2 Bro. C. C. 291.

(g) 1 Mer. 285.

(h) 2 Mer. 128.

(i) 7 T. R. 482, S. C.; 2 Bos. &amp; P. 500, in the House of Lords on appeal.

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held to confine the operation of the codicil, there being no indication of an intention to republish the will, to be collected from any other part of it. Yet even there Lord Thurlow, on an appeal to the House of Lords, considered the codicil to amount to a general republication. Viewing this as a question, not of republication, but of construction, the dispositive parts of the codicil, and particularly the residuary clause, coupled with the strong and unequivocal language of the preamble, are sufficient to pass the after-purchased property with the rest; *Bibin v. Walker*.<sup>(a)</sup>

Assuming the decision to be against the appellant upon the first point, it is too late to ask for an account of the rents of these houses after the widow's death. The claim was only set up by the amended bill in the end of the year 1829. The rule at law is, that where a person is in possession, you must first bring ejectment against him, and then resort to the action for mesne profits. If the defendant die before recovery in the ejectment, the remedy is gone, for no action lies for mesne profits while the legal title is in dispute; *Newton v. Graham*,<sup>(b)</sup> *Hambly v. Trott*,<sup>(c)</sup> and *Boylster v. Dodsworth*,<sup>(d)</sup> have no application. Where the demand, as in the present case, is of a purely legal nature, courts of equity follow the rule of law and refuse the account. In *Barnewall v. Barnewall*,<sup>(e)</sup> where after a recovery in ejectment the defendant died, a bill filed against his executor for an account of [\*128] rents and profits was dismissed; \*and the language of Lord Eldon in *Pulleney v. Warren*,<sup>(g)</sup> recognizes the same doctrine. It is clear that, if Mrs. Monypenny were now alive, no action for money had and received, or for use and occupation, could be maintained against her; as the title to the land is disputed, and could not be tried by those forms of action; and her executor stands precisely in her place. The court has no original jurisdiction to entertain a suit for mesne profits, and unless there be equitable circumstances to call its jurisdiction into operation, the parties must be left to their legal remedies;

(a) Amb. 661.

(b) 10 B. &amp; C. 234.

(c) Cowp. 371.

(d) 6 T. R. 681.

(e) 3 Ridg. P. C. 24.

(g) 6 Ves. 72.

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for when equity gives the account, it proceeds on the analogy of the rule at law. *Tilley v. Bridge*,<sup>(a)</sup> *Dormer v. Fortescue*,<sup>(b)</sup> *Norton v. Frecker*,<sup>(c)</sup> *Hutton v. Simpson*.<sup>(d)</sup>

There are no equitable circumstances to justify the court in interfering, even supposing, contrary to the fact, that a judgment in ejectment had been recovered in the lifetime of the widow. *Duke of Bolton v. Deane*.<sup>(e)</sup> The plaintiff has been himself guilty of great laches in not filing his bill till long after the widow's death; and there is no pretence of fraud: all parties acted innocently. The rents were paid to the widow under a common error, against which, it being an error of law, there can be no relief. *Bramston v. Robins*.<sup>(g)</sup> Neither is there any mutuality of accounts, the judgment of his Honor, from which the plaintiffs have not appealed, having expressly decided otherwise. The mere fact that the remedy is gone at law, will not entitle parties to come into this court for an account. *Lansdowne v. Lansdowne*.<sup>(h)</sup> In *Curtis v. \*Curtis*,<sup>(i)</sup> the widow had [\*129] filed her bill for dower and an account, before the heir died, so that her claim was properly before the court; and in *Pulteney v. Warren*,<sup>(k)</sup> the right had been established by a verdict in the lifetime of the party.

But, admitting the jurisdiction to exist, still the decree cannot be supported; for where a party who has committed no fraud has enjoyed undisturbed possession under a mistake, or where the plaintiff has been guilty of laches, the account is not to be carried back farther than the filing of the bill; *Pulteney v. Warren*,<sup>(k)</sup> *Drummond v. Duke of St. Alban's*,<sup>(l)</sup> *Pettibard v. Prescott*,<sup>(m)</sup> *Edwards v. Morgan*,<sup>(n)</sup> *Pickett v. Loggon*; <sup>(o)</sup> or, at all

(a) 2 Vern. 519; Pr. Ch. 252.

(b) 3 Atk. 130.

(c) 1 Atk. 524.

(d) 2 Vern. 724.

(e) Prec. Ch. 516.

(g) 4 Bingh. 11.

(h) 1 Mad. 116; 1 J. & W. 522.

(i) 2 Bro. C. C. 620.

(k) 6 Ves. 72.

(l) 5 Ves. 433.

(m) 7 Ves. 541.

(n) M'Clel. 541.

(o) 14 Ves. 215.



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events, it ought to be confined to the six years immediately preceding; *Reade v. Reade*,(a) *Harmood v. Oglander*,(b) *Stackhouse v. Barnston*.(c)

Sir *E. Sugden* and Mr. *Barber*, in support of the decree.

The first point is decided by *Bowes v. Bowes*,(d) which is on all fours with the present case, and has always been followed and approved. *Parker v. Biscoe*.(e) *Bowes v. Bowes*, indeed, was much stronger in favor of republication, for there the testator's object was a mere substitution of trustees, and it might well have been supposed that the trusts were meant to extend to all the property he possessed, whereas the sole purpose of this testator's codicil was to subject all the previous devises to a life estate to his wife, in whose favor the interests of the other devisees were to be postponed; and the \*language used in the codicil is studiously and correctly framed to effect that single object. The idea of passing subsequently acquired property, the recollection that he possessed any, never once occurred to his mind. The general words of the preamble must be construed with reference to the dispositive clauses which follow, and these are cautiously and expressly confined to the estates already given by the will.

There is more novelty in the second point, but the claim is founded in substantial justice, which the court will not permit to be defeated by technical objections. It has never been determined that a bill will not lie for the recovery of rents and profits, where the title is either not disputed, or has been established by a judgment at law; or where circumstances have precluded the possibility of trying the title by ejectment. The cases referred to of *Dormer v. Fortescue*, *Curtis v. Curtis*, and *Pulteney v. Warren*, as far as they go, show directly the reverse. All that Lord Hardwicke meant to say in *Norton v. Frecker* and *Dormer v. Fortescue*, was, that he would not, in aid of a mere ejectment bill,

(a) 5 Ves. 744.

(b) 6 Ves. 199.

(c) 10 Ves. 453.

(d) 7 T. R. 482; 2 B. & P. 500.

(e) 3 Moore, 24.

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where infants were not concerned, and there was neither fraud nor trust to create an equity, make this court ancillary to the ejectment by decreeing an account, instead of leaving the plaintiff to recover the mesne profits by action; and if *Barnewall v. Barnewall* decided anything further, its authority is very questionable. It is not the mere loss of the legal remedy by the accident of a wrongdoer's death, which of itself can entitle a party to come here; but in *Lansdowne v. Lansdowne* the account was given against the representative of the tenant for life, except as to the permissive waste. Independently of the general question, and without contending that a decree for an account of mesne profits may be always had in equity as a matter of course, it is \*enough for the plaintiffs that the circumstances here are so peculiar as of necessity to ground the jurisdiction. The bill is not filed merely for an account; it prays a delivery of the title deeds; and the account is incidental to that relief; for the defendant is entitled to retain the deeds till the sums paid by his testatrix, which sums the will has charged on the devised estates, have been repaid. *Dormer v. Fortescue*.(a) The nature of those counter-claims, too, creates a mutual accountability which especially calls for equitable interposition. The widow having got into possession, with the acquiescence of the heir, under a common mistake, was not a trespasser or wrongdoer, and the heir may therefore elect to treat her as his tenant or bailiff, and come into equity for an account of the rents as moneys received to his use. Supposing those equitable circumstances had been wanting which here give the jurisdiction, the plaintiff might still have had a remedy at law by waiving the *tort* and proceeding by an action for use and occupation, or for money had and received; for *Birch v. Wright*,(b) only decided, what is confirmed by *Pulteney v. Warren*, that after bringing ejectment which is founded in *tort*, a party cannot recover the rents and profits by an action for use and occupation: but in *Pearce v. Day*, before Lord Tenterden, the assignees of a bankrupt who had made a fraudulent conveyance of his life interest

(a) 3 Atk. 124.  
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(b) 1 T. R. 373.  
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in certain property, and died before ejectment could be brought, recovered the value of the rents and profits from the person in possession under the conveyance; a direct authority to prove that a party may, if he pleases, waive the *tort* and proceed upon the implied contract.

All the authorities show that if the account is to be given, it ought to be carried back to the time when the title [\*132] \*originally accrued, unless indeed, which he has not attempted in the present instance, the defendant thinks fit to set up the Statute of Limitations; and that can only be done with effect by formally pleading it to the suit, or insisting upon it by way of defence in the answer.

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1832: Jan. 25<sup>th</sup>.—THE LORD CHANCELLOR, after stating the question, and reading the material part of the codicil, continued as follows:

That a codicil makes the will speak as of its own date, must be admitted to be the general rule; but it may, nevertheless, be framed in such a manner as to operate as a partial republication only, or to work no republication at all. If, for example, I leave by will all my farms at Dale to A., and having afterwards acquired another farm at Dale, I say in a subsequent codicil, "I hereby give to B. the identical farms which my will has given to A.," it would obviously be doing violence to the language to construe those words as carrying the newly acquired farm. This, in substance, is the case of *Bowes v. Bowes*,<sup>(a)</sup> and in substance also the case before the court, although I take *Bowes v. Bowes* to be the stronger of the two in favor of republication. The testator there had by his will devised all his freeholds and copyholds to six trustees; by his codicil reciting the trust and revoking it so far as it related to two of the six trustees, he devised to the remaining four his *said* lands, upon the same trusts on which the

(a) 7 T. R. 482; 2 Bos. & P. 500.

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will had given them to the six; and Lord Kenyon held it to be too clear for argument that the will was not republished by that codicil; an opinion in which *Grose* and *Lawrence*, Justices, fully concurred. The case which goes furthest in favor of republication, \*and furthest from the principle of *Bowes* [\*133] *v. Bowes*, is *Pigott v. Waller*,<sup>(a)</sup> where Sir William Grant went largely into the consideration of the subject, and reluctantly followed the doctrine of the more modern decisions. On a subsequent day he said he had omitted to mention *Bowes v. Bowes*, and remarked that the court in that case proceeded upon the intent appearing on the face of the codicil. The case of *Goodtitle v. Meredith*,<sup>(b)</sup> where the general principle is laid down broadly, also recognizes the authority of *Bowes v. Bowes*. In *Hulme v. Heygate*,<sup>(c)</sup> the Master of the Rolls, while he expresses his entire concurrence with the judgment in *Bowes v. Bowes*, holds it to be "a point now clearly established as a general rule, that a codicil duly attested does amount to a republication;" and he afterwards observes,<sup>(d)</sup> "I must absolutely deny the inference, that, because the testator has thought fit to specify some of the after-purchased estates in this codicil, I am therefore to exclude all the others. To the question, why does he expressly mention some except for the purpose of excluding the others, I answer, that the question would apply equally to the will itself, and tend to exclude all the estates whatever, except that which is there specified."

It is quite another thing, however, to maintain that a codicil shall in all cases necessarily amount to a republication; for here it is as if the maker of the codicil had said, "I am now dealing with the property I have given, and with no other." And this view is rather confirmed than shaken by reverting to the preamble on which the defendant's counsel laid so much stress. My observation with respect to that is, that if, upon the subsequent part, the testator's intention were doubtful, \*that [\*134] preamble might lead us to a construction of the inten-

(a) 7 Ves. 98.

(c) 1 Mer. 290.

(b) 2 M. &amp; S. 5.

(d) 1 Mer. 294.

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tion; for ever since the case of *Acherley v. Vernon*,<sup>(a)</sup> the principle has been to presume in favor of republication, making that the rule, and the restriction the exception; and thus to throw the burden of showing a limited intent upon the party who denies the operation of the codicil. I cannot, therefore, agree in thinking that this codicil was no republication, unless the testator thereby indicated an intention to republish. But, inasmuch as the operative words in it appear to me to be sufficiently restrictive, the preamble is not, I apprehend, to be taken into consideration. The decision in *Bowes v. Bowes*, which indeed is a weaker case, seems entirely to dispose of the present question. In *Bowes v. Bowes*, as in the present instance, the testator revokes the devise; but he does here what I take to be much stronger, for the codicil purports to devise "my said estate, so given to the said Phillips Monypenny as hereinbefore lastly recited." And what were the estates which were so given, and what was the recital? Clearly, to use the language of Mr. Justice *Grose*, the testator could not mean estates afterwards acquired, for they were not then his to give.

Thus far upon the point of republication, which after all is but a secondary question, the main contention being whether the executor of Mrs. Monypenny shall account for the rents of those after-acquired houses which during her life she held without a title, possessing them, not adversely, nor as the bailiff of the owner, and accountable to him (for the owner was ignorant of his rights), nor yet under any contract, hardly even by sufferance, but, as it is alleged, under a mistake in law. Upon this point, I confess,

I have felt a great deal of difficulty; but, after the best [\*135] consideration \*I have been able to give, and having regard to the peculiar circumstances of the case, I am, on the whole, inclined to agree with his Honor upon this part also of his judgment, and to decide that the personal representative of Mrs. Monypenny is bound to account for the rents. The leaning ought clearly to be towards making him an accounting

(a) 3 Bro. P. C. 86, Toml. edition.

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party. The niceties at law upon this subject are illustrated in the well known case of *Hambly v. Trott*,<sup>(a)</sup> where Lord Mansfield lays down the doctrine that *tort* or trespass will not lie against an executor; but that where, besides the crime, property is acquired which benefits the testator, an action for the value shall survive, and that, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged. The judgment, however, in *Hambly v. Trott* does not assist us much, for the question in that case was, not whether the remedy lies against the executor, but whether it lies against the party in his lifetime? Here, on the other hand, there was no ejectment, and consequently no action for mesne profits brought in Mrs. Monypenny's lifetime, as she died before the mistake was discovered.

Upon the whole, although I do not see my way clearly amidst the apparent conflict of *dicta* and authorities upon this point, I can find no satisfactory reason to justify me in reversing the judgment of the court below. I shall affirm the decree without costs, and direct the deposit to be returned.<sup>(b)</sup>

(a) Cowp. 371.

(b) Upon the effect of a codicil in republishing the will, in addition to the cases cited in the argument, see *Guest v. Willasey*, 2 Bingh. 429, and 3 Bingh. 614; *Williams v. Goodtitle*, 10 B. & C. 895. As to the time from which the account will be directed, and the necessity of insisting upon the Statute of Limitations by way of defence in the pleadings, *Hercy v. Ballard*, 4 Bro. C. C. 468; *Cory v. Cory*, *post*; but see *Collins v. Archer*, 1 Russ. & M. 284. In *Gardiner v. Fell* (1 Jac. & W. 22), no doubt seems to have been suggested as to the right of the court to decree an account of rents and profits from the time when the title accrued against the personal representatives of a person who had been allowed to take possession under a mistake of law, and who died before the title was disputed.

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Bartleman v. Murchison.

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[\*136]

\*BARTLEMAN v. MURCHISON.

1831: 14th and 15th January.

A testator gives to his mother an annuity for life, and after her decease to his sister, if she be a widow, but not otherwise, but to revert back to his children, after her death. At the death of the testator and of the mother, who survived him, the sister was a married woman: Held, that the sister, on afterwards becoming a widow, was not entitled to the annuity.

THE question arose on the construction of the following clause in a will: "I give and bequeath unto my mother, Mrs. Janet Murchison, the sum of 100*l.* sterling money per annum, payable every six months during her natural life, and after her decease to my sister Mrs. Margaret Bartleman, that is to say, if my sister be a widow, but not otherwise, but to revert back to my child or children after her death, and that a sufficient sum for the above purpose shall be invested by my executors in the British funds." The testator also appointed his children his residuary legatees.

Janet Murchison and Margaret Bartleman both survived the testator. At the date of his will and the time of his decease, Mrs. Bartleman was a married woman, and she continued under coverture till some time after the death of Mrs. Murchison, when her husband having died, she filed her bill claiming the annuity. The executors put in a general demurrer, which the present Vice-Chancellor on argument allowed, and the plaintiff thereupon appealed.

*The Solicitor-General and Mr. Temple, for Mrs. Bartleman.*

[\*137]

\*This is a mere question of intention to be collected from the language of the instrument itself, as applicable to the relative situation of the parties. The natural presumption is that the testator wished the annuity to be a provision for his sister (who was plainly an object of his affection), but to take

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effect only at the time and in the single event of her becoming a widow. The word, "be" is here equivalent to become; or the same result will be arrived at by reading the word "if" as if it had been written "when;" a construction frequently adopted where good sense and probability recommend it; *Smart v. Clark*.(a) During the plaintiff's coverture, the burden of supporting her would of course fall upon her husband: but when he died, her situation would be materially altered; and it is irrational to suppose the testator could have meant to leave her title to his bounty to depend on the collateral accident of her being or not being a widow, at the time when the prior life estate determined. According to the clause even as it stands, every letter of the bequest has been strictly fulfilled, and the plaintiff is therefore entitled to demand the annuity. The bequest is to Mrs. Bartleman, *after*, not *at*, the mother's decease; and if she be a widow and not otherwise. The mother is now dead, and Mrs. Bartleman is a widow. It is true she was not a widow at the moment when the mother died: but no such term is annexed to the gift by the will; and the court will not import into it a condition which is not expressed, which is not required by any legal principle, and of which the operation would be to defeat the bequest altogether. There is no peremptory rule of law which prescribes that the vesting of a legacy shall not remain in suspense during any number of existing lives. On the contrary such suspense is extremely common, as in the case of bequests \*to females on their marriage, and no practical [\*138] inconvenience has been found to result from it. *Godfrey v. Davis*,(b) and other cases of that description have no application: for here the legatee was *in esse*, and her enjoyment only was postponed; and it is not necessary that the interest should become vested absolutely at the determination of the particular estate, provided the period of suspension does not exceed the rule against perpetuities. The peculiar wording of the last sentence, when it speaks of the fund reverting back to the testator's children after Mrs. Bartleman's death, fortifies the construction founded on the language of the bequest; for if the legacy were

(a) 3 Russ. 365.

(b) 6 Ves. 43.



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*Bartleman v. Murchison.*

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never to vest in her, or never to be suspended, with what propriety could it be directed to revert back to the children upon that event? and as the capital was to be invested, and the children were to take no interest in the fund till after her decease, the principal till then could not be touched, and what was to become of the dividends in the mean while? Had the testator considered them undisposed of, would he not have included them expressly in the residuary clause? On the other hand, the claim of the defendants cannot be maintained without doing violence to the will, for either the word "after" must be construed to mean "at," or the description of the legatee must be qualified by the insertion of the word "then" or some other phrase of the like import, and that for the very purpose of excluding her.

Sir *E. Sugden* and Mr. *B. Parry*, contra.

There is nothing illegal in the suspense which the plaintiff's construction would require, but it is contrary to the probable intent, and will not be presumed where the words are [\*139] fairly capable of a different meaning. In \*deciding questions of this kind with respect to personal property, the court always leans to that interpretation which will prevent or most speedily put an end to the contingency. The rule is founded partly on convenience, partly on the analogy of the law as to real estates, and partly on considerations of probability; and it has prevailed in a variety of cases where the argument now set up was attempted without success. *Ellison v. Airey*, (a) *Godfrey v. Davis*. (b) Upon the same principle a legacy to the children of A., or to A.'s children, after the death of B., or to A.'s children generally at twenty-one, will exclude, in the respective cases, all such children as happen to come into *esse* after the death of the testator, or of B., or after the time when the eldest attains twenty-one; these being the first periods respectively when the interest given can by possibility be held to vest. Here, if no prior life estate had been bequeathed, a doubt could not be

(a) 1 Ves. sen. 111.

(b) 6 Ves. 43.

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suggested—the case would range within the first of these classes: the insertion of the life estate to the mother makes it fall precisely within the principle of the second. According to the defendants' construction not a word requires to be inserted, rejected, or altered. "After" must mean immediately after, that is, at the decease. The obvious purpose was to make a provision for Mrs. Bartleman only in case she was a widow at the determination of the mother's life interest, and not at any time when she should become so. The plaintiff's argument would go the length of holding that the annuity was to be enjoyed *durante viduitate*, to vest the moment she became a widow, and to be again divested every time she married; a most extravagant supposition, and directly at variance with the subsequent clause, by which the fund was not to "revert back" to the children till after her decease. That phrase creates no real difficulty, for it only refers to the [\*140] case of the legacy having vested; if that has once happened the fund is not to revert till after the legatee's death. Perhaps the testator may not have contemplated, and therefore not provided for the event that has occurred; perhaps he may have foreseen and not thought proper to provide for it; but either way Mrs. Bartleman can have no claim.

THE LORD CHANCELLOR:—Although in construing bequests of personal estate, the same technical strictness does not prevail as in devises of real estate, the same rules are to a great extent applicable, not only with a view to avoid a perpetuity, but also to determine with certainty the persons to whom the property is to go. It may therefore become necessary in construction to supply by intendment the words "living at the time of the testator's death" in a gift of personal, as well as of real estate. For example, in a bequest to the children of A., the words are confined to such of A.'s children as are living at the testator's death. So where the legacy is given at the determination of a particular estate previously limited—as where the legacy is to A. for life, and after his decease to the children of B., the like rule of construction, imported from the law as to real estates, is allowed to operate, and it restricts the bounty to the children of B. who are

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living at the death of A., that being the time when the interest is to vest in possession. A court of equity will not presume that a party who is not *in esse* is intended to take, unless such an intention be made plain and put beyond dispute by the words of the will; and it is only following out the same principle to hold that a person, to whom a legacy is given in a particular character, and by a particular description, shall not be entitled [\*141] \*to it, unless he be clothed with that character, and answer that description, at the moment when the legacy might vest in possession.

This then is the first difficulty. Besides, I greatly doubt whether under the residuary clause the testator meant to deal with the property during the intermediate period while Mrs. Bartleman was a married woman, especially as he has not left that clause to provide for a case which it would much more naturally have covered, and which was much more obviously in his contemplation—I mean the application of the fund in the event of Mrs. Bartleman's death. The probability is, that the particular contingency which has taken place never occurred to his mind. According to the plain sense of the words, the bequest is, after the mother's decease, to the sister, provided she be a widow at the period when the interest is to vest, if at all. In general, a testator does not provide for all cases. He may, however, have said to himself here, "if my sister be a widow at the death of my mother, she shall have the annuity; but her husband will then see whether I have made a provision for her or not, and will act accordingly; and then, when only she takes it, she shall take it for life, for I will not suspend the gift; I provide only for ordinary circumstances." The authority of *Smart v. Clark* is by no means broken in upon by this construction. The five years there specified had clearly reference to the non-claim only, but upon the death of the legatee at any time, the bequest over was to take effect.

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 Barnsdale v. Lowe.
 

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\*BARNSDALE v. LOWE.

[\*142]

1831: 27th January.

The court will not make an order for the publication of depositions taken in a suit, to perpetuate testimony, whilst the witnesses are alive.

MR. COOPER moved that depositions taken in this cause might be published, notwithstanding that the witness was alive. The circumstances under which he made the application were these: an intending purchaser having taken it as an objection to the title of an estate, that two of the attesting witnesses to a will under which the estate was held were dead, it was made a condition of his contract that a bill should be filed to perpetuate the testimony of the surviving witness. The bill was filed accordingly, and it now became material to see the effect of the witnesses' evidence. The principal defendant, the heir at law, was under age, and therefore incapable of consenting; but it was the wish of all parties that the order for publication should be made. Mr. Cooper referred to the Practical Register, (a) to *Harris v. Cotterell*, (b) and to *Dursley v. Fitzhardinge*, (c) as furnishing some authority for contending that, under peculiar circumstances, and in a strong case, the court would relax the strictness of the general rule.

THE LORD CHANCELLOR said that, although he felt very great doubt how far he was at liberty to accede to the application, he should, before he finally disposed of it, direct a search to be made for precedents,

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Jan. 31st.—THE LORD CHANCELLOR stated that his observation on the former day, with respect to the understanding of the profession being unfavorable to applications \*like [\*143]

(a) Wyatt's edition, p. 73.

(b) 3 Mer. 678.

(c) 4 Camp. 401.

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*Barnesdale v. Lowe.*


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the one before him, had been fully confirmed by the further inquiries he had made. It appeared from the precedents with which he had been furnished by the Registrar, Mr. Bedwell, that Lord Eldon had, perhaps incautiously, permitted publication to pass in the case of *Dursley v. Fitzhardinge*; but in that case the objection did not seem to have been suggested, and the order probably was made *sub silentio*.

It was evident, however, that Lord Eldon was not altogether satisfied with what he had done on that occasion, for in two subsequent cases where similar motions were made under circumstances of considerable urgency, his Lordship declined to follow the precedent he had himself created, and would not listen to the application. The Lord Chancellor added that there would be great danger in departing from the strict rule; the authorities were all against any such departure; and as there was nothing in the present case which peculiarly called upon the court to make an exception in its favor, he felt no difficulty in refusing the motion.

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The following are the notes of the cases, to which the Lord Chancellor referred in the preceding judgment:

Friday, 14th of December, 1809.

The Right Honorable William Fitzhardinge, Earl of Berkeley,  
lately called Viscount Dursley, and others,        -        plaintiffs.

The Honorable Thomas Fitzhardinge Berkeley and others,  
defendants.

Upon the affidavit of Mr. George Frere of Lincoln's Inn, and an affidavit of notice to the defendants' motion, that the [144] depositions of the late Earl of Berkeley might \*be published for the above named plaintiff, to make use of them before the House of Lords, or before any committee of the said House; his Lordship doth order that the said depositions of the

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 Barnsdale v. Lowe.
 

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Right Honorable Frederick Augustus, late Earl of Berkeley, be forthwith published accordingly. But the plaintiffs' clerk in court is not to publish the depositions of any of the other witnesses.

Reg. Lib. A. 1809, fo. 58.

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14th of July, 1813.

COVENTRY v. COVENTRY.

Mr. *Richards* moved his Lordship that publication might forthwith pass, and that the examiner might be ordered to deliver out copies of the depositions.

The bill had been filed to perpetuate. Sir Samuel Romilly read the Practical Register as the only authority.

Lord Eldon said, depositions ought not to be published, except between the parties in the cause; he had great doubt about the *Berkeley Case*, and great fault had been found with that publication. His Lordship observed that very great care should be taken about the practice in this case, and that he would consider it. He added, that the reason why he published the depositions in the *Berkeley Case*, was to support the dignity of the family.

The order does not appear from the Registrar's minute book to have been drawn up, and it is not entered.

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12th of February, 1817.

\*MORRISON v. ARNOLD. [145]

In this case the testator made two wills, which materially differed from each other: the latest in point of date he signed in his bedroom, and it was witnessed in an adjoining room by three witnesses, but they did not see the testator sign it, neither did

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Barnsdale v. Lowe.

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he acknowledge it to the witnesses as having been executed by him. As it became necessary to sell the testator's estates, which were of great value, it was requisite that the second will should be proved not to have been legally executed; and for that purpose a bill was filed in this court to examine the three witnesses, and perpetuate their testimony. After this had been done, and the witnesses had been examined by the examiner, a difficulty arose in procuring publication of the depositions, the witnesses being all alive; and Sir Samuel Romilly on the above day moved his Lordship that the depositions might be published, at the same time stating that he could cite no case to his Lordship as an authority for the application. Lord Eldon said he would look into authorities, but not finding any, he desired to see the form and allegations of an order where depositions *had been* published. As no precedent could be found where the witnesses were living and the bill had been to perpetuate, the Registrar furnished his Lordship with the order made, upon the death of one of the witnesses, in the case of *Lord Abergavenny v. Powell*, 12th July, 1816, Reg. Lib. A. 1815, fo. 1261 (which is in the same form as that in the *Berkeley Case*). His Lordship told Sir Samuel Romilly and the Registrar, he thought he should order the depositions to be published; but he observed afterwards, that as the witnesses had signed a declaration on the back of the will that they did not see the testator sign, and that he had not acknowledged the will to have been executed [\*146] \*by him, such an order was in truth unnecessary, and his Lordship therefore refused to make it.

As it was a matter of great importance to have the depositions published, Sir Samuel Romilly, on the 11th of February, 1817, again pressed the publication, and on the 12th of February his Lordship again said it was unnecessary, as the second instrument was not a will; and he added that he would order the depositions to be published, if a precedent could be produced to him, but not otherwise.

The same application was afterwards renewed before his Lord-

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Monkton v. Attorney-General.

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ship, who said he was perfectly right in what he had done; and, as no case could be produced as an authority for such an order, the solicitor for the plaintiff gave up the point, and filed a bill to obtain an issue.

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\*MONKTON v. ATTORNEY-GENERAL.

[\*147]

1831: 17th, 18th and 22d January.

Where, in a pedigree case, the object is to connect A. with C., after proving that B., a deceased person, was related to A., it is competent to give in evidence declarations by B., in which he claimed relationship with C.

A paper in the handwriting of B., found in his repositories at his death, and purporting to give a genealogical account of his family, of which it represents C. to have been a member, is admissible for the same purpose, though never made public in B.'s lifetime, though erroneous in various particulars, and professing to be founded chiefly on hearsay.

Nature and amount of the evidence upon which the court will direct an issue to investigate a title depending on a question of pedigree.

After a residuary fund had been paid into the exchequer, under a decree establishing the right of the crown, parties setting up a title to the fund were permitted, upon petition in the cause, and with the leave of the crown, to go before the Master for the purpose of making out their claim.

IN the month of July, 1785, Samuel Troutback died at Madras, at a very advanced age, leaving behind him a large fortune, which he had acquired in trade during a long residence in the East Indies. By his will, dated the 21st of July, 1780, he gave the bulk of his property to trustees, for the purpose of founding a school for the education of orphan children, in the parish of St. John, Wapping, "to be called Troutback's Poor Orphan Hospital, or Blue Coat School;" and the will contained very minute directions with respect to the endowment and regulation of the charity.

The motives which (in part at least) influenced the testator in making this disposition of his property, sufficiently appear from



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the declaration contained in the will itself. After reciting that he had no relation or kindred alive, to his knowledge or belief, having outlived them all, his son George and his late dear beloved wife being the last deceased, the testator bequeathed "five gold star pagodas to every person who shall, within three years after my decease, prove themselves to be lawful sons of any person surnamed Troutback, and born a native of England," and he likewise gave "unto Mr. John Troutbeck, surgeon, late of the ship Speke, in the English East India Company's [\*148] service, the sum of five gold star \*pagodas, provided he demand the same of my trustees, at Fort St. George, in person, within three years after my decease, and not otherways, as a person nearly of the same name with Troutback, though I solemnly believe and declare that the said John Troutbeck is not any way related to me, or of the same family and kindred with me, and I disclaim all relationship with him or to him." Next came the following recital: "And whereas it is natural for all men to have a regard for their native place, and where the seeds of their education were first planted and imbibed, and more especially when they have no kindred or relations alive or in being, which is the case with me, who came on shore naked and shipwrecked in India, at the same time I lost my only brother, who was drowned." The testator then proceeded to dispose of his property for the charitable purpose already mentioned. In the course of that disposition he spoke of the public charity school, built and standing near St. John's Chapel, in Wapping, "being the school where I got my first education, but not boarded at, in the years 1706, 1707 and 1708, during the tutorship of my godfather, the late Samuel Jeffries, gentleman, the head schoolmaster." And in another passage, after giving a sum for the purchase of an organ in St. John's Chapel, Wapping, he directed the following inscription to be cut and gilt in front of it: "The gift of Samuel Troutback, merchant, born in this parish, Anno Domini 1700." In another part of his will he stated that Providence had "prospered his honest endeavors in the East Indies, during his residence there, now nearly sixty years."

In the year 1792, a suit was instituted for the purpose of administering the trusts of this will, and under the decree the Master was directed to take the usual accounts, and also to inquire who were the testator's \*heir at law [\*149] and next of kin. In July, 1813, the Master reported that no heir at law or next of kin of the testator could be found. The report was, in July, 1814, followed by a decree, whereby it was declared that the bequests to charitable uses contained in the will were void, and that, as the testator had left no heir at law or next of kin, the residue of his real and personal estate had vested in the crown; and, accordingly, in the month of April, 1816, a sum of 88,045*l.*, being the produce of the clear residue, after deducting the costs, was paid into his Majesty's exchequer in pursuance of that decree.

In June, 1825, George Cawthorne, Catherine Robson, and Isabella Ainsley, who claimed to be entitled to a share of the testator's residuary estate as three of his next of kin, having previously obtained leave from the treasury, were, on their petition in the original suit, permitted to go before the Master for the purpose of establishing their title in that character. In June, 1827, the Master made a report against their claim, and the petitioners thereupon excepted, and at the same time applied that an issue might be directed, in order that the question of propinquity, which the claim involved, might be more thoroughly investigated before a jury. The Vice-Chancellor overruled the exceptions, and refused the trial at law, on the ground that no sufficient *prima facie* case was shown for it. The claimants now appealed from his Honor's decision.

On the appeal, the main question came eventually to be, how far the Vice-Chancellor was right in rejecting from his consideration, as evidence of the relationship between the testator and the claimants, certain documents purporting to be a genealogical narrative and pedigree of the Troutbeck family. These documents were in the handwriting of John Troutbeck (the surgeon \*in the East India Company's service, mentioned [\*150]

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Monkton v. Attorney-General.

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as a legatee in the will), and were found in his repositories at the time of his death, which took place in the year 1792.

The narrative bore date 1781, and began in these words :

“The following account of the family of Troutbecks, being the best I can at present collect, I commit it to paper, as a memento, hoping at some opportunity to revise it, and make it more correct and perfect.

“In the following there appears a deficiency about the second generation, which nothing but the examination of old wills can rectify.”

After referring shortly to the early traditions of the family, the narrative took up the genealogy at a Sir Robert Troutbeck, who was admitted vicar of Newton in 1593, and it went through the history of his descendants in succession as follows :

“Sir Robert Troutbeck was married to Mary Wilkinson, and on the 11th of January, 1637, he died and was buried at Newton, leaving issue five sons and two daughters, as appears by his will—William, George, Christopher, Lancelot, and John. William married, and lived at Blencow. George was rector of Bowness in 1660. He died in 1691, and left issue two daughter, who were married to Hodgson of Easton and Lawson of Bowness. Of him 'tis remarked, that he laid down his gown and took his sword during the civil wars, and then resumed his gown again. Christopher lived nigh Wigton in Cumberland ; but whether he had any family I never could learn.

Lancelot, it is said, died young. John lived at Raven-  
[\*151] head, and, it is said, had two sons \*that went abroad, but where is uncertain. William of Blencow had five sons—George, John, William, Ralph, and Robert. George lived at Blencow. John was educated for the church : he was rector of Wilingbro', Northamptonshire, and had three sons—Edward, William, and Thomas. William lived in Gray's Inn Lane, Lon-

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*Monkton v. Attorney-General.*

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don, had one son, William, that succeeded him. Ralph married, was in Ireland, and had, it is said, three sons. George, one of his sons, came over to England, and after the death of Ralph the widow came over, with her other two sons, and lived (as Mr. Troutbeck of Madras informed me) somewhere in Wapping, London. She married one Nicholson: they went to live near her son George in Ridon, near Corbridge, Northumberland, where she died. This I was informed by a daughter of George's in 1780. Samuel and Benjamin, two of her sons, went, on this, to sea, and were both in the Prince George Indiaman, when she was lost near Bombay. Benjamin, with most of the crew, was drowned. Samuel got to Madras, where he married a woman from Angengo, and had by her two sons, both of which died young." The narrative then proceeded to trace the descent of the various members of the branch of the Troutbecks settled at Blencow, till it came to the narrator himself, whom it described as one of the three sons of George of Blencow, who was the son of another George, and the grandson of William of Blencow, the brother of Ralph already mentioned; and it spoke of him in these terms: "John went over to America when young, under the direction of his uncle at Boston, in New England, and there served an apprenticeship to John Greenleaf. On account of the troubles breaking out in 1769, he came over to England, and, after attending various hospitals in London, the troubles not ceasing, he went as surgeon of one of the Honorable East India Company's ships, and continued in that employ till 1783, after which he went to the south of France, to \*all [\*152] parts of Switzerland, and to Rome, Naples, Florence, Venice and all parts of Italy."(*a*)

The pedigree, which was apparently drawn up at the same time with the narrative, was conformable to it, and the result to be collected from the two together was, that George of Blencow, the narrator's father, and Samuel, the testator, who died at Madras, were descended from the same grandfather, William of

(*a*) The last passage appeared to have been added afterwards, and was in a different ink.

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Meakton v. Attorney-General.

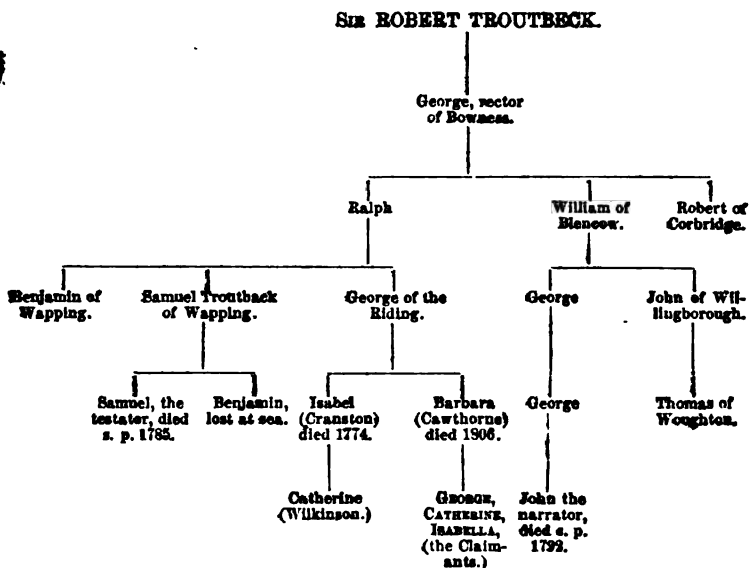
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Blencow, and were of course first cousins; and that failing Thomas Troutbeck, who was described as the then rector of Woughton, and was the son of John of Willingborough, and therefore a degree nearer, the narrator and his brother would be two of Samuel the testator's next of kin.

The pedigree set up by the claimants was different in several respects. They, too, derived their origin from Sir Robert Troutbeck; but they contended, and it was established beyond dispute, that his son George, the rector of Bowness, was not the brother but the father of William of Blencow. According to the case they made, George of Bowness was the common ancestor of Samuel the testator, of John the narrator, and of the petitioners. George had among other children Ralph, William of Blencow, and Robert of Corbridge. Of these, William was the narrator's great grandfather. Robert died unmarried, and Ralph married and went to Ireland, where he died, leaving three sons. Two of those sons, Benjamin and Samuel, were supposed to have gone to sea early in life, and to have resided, when at home, at Wapping. George the youngest returned from Ireland with his mother, settled at the Riding in Northumberland, and [\*158] was the claimant's grandfather: Samuel was the \*father of Benjamin, who was drowned at sea, and also of Samuel the testator.

It was at first conceived that the testator was a brother of George of the Riding, and this was supported by certain hearsay declarations, said to have been made by the latter many years ago, with respect to his having a rich brother in India; but on its being afterwards ascertained that the testator was the son of a Samuel Troutback mariner, and Sarah his wife, and was born in the parish of St. John's, Wapping, in 1700, in which points the entry in the parish register tallied exactly with the statement in the will, that supposition was given up; another generation was interjected between George and the testator, and George's declarations were explained as having reference, not to a brother but a nephew.

The nature of the claimant's case will be understood by referring to the following pedigree:



\*The evidence satisfactorily proved that George [\*154] Troutbeck, the son of Ralph, lived and died at the Riding, and that two persons of the names of Benjamin and Samuel Troutbeck, who were alleged to be brothers, and who were described as mariners, lived occasionally at Wapping towards the close of the 17th century. There was no difficulty in connecting the claimants and the narrator with George of the Riding: and the testator was distinctly shown to be the son of a Samuel Troutbeck of Wapping: the difficulty lay in connecting George with Samuel, and as for this purpose the narrative of John, the surgeon, became, if admissible, most important evidence, the great contention on both sides related to its admissibility.

Sir E. Sugden, Mr. Pollock, Mr. Knight and Mr. Starkie, for the claimants.

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 Monkton v. Attorney-General.
 

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The *Attorney-General*, the *Solicitor-General*, Mr. *Wray*, and Mr. *W. Brougham*, for the crown.

On behalf of the appellants it was first argued, that the narrative of John Troutbeck was admissible as evidence to prove the alleged relationship between George of the Ridings and the testator; and in support of that position the following cases were cited and relied on, the *Berkeley Peerage Case*, (a) *Vowles v. Young*, (b) *Doe d. Johnson v. Pembroke*, (c) *Doe v. Randall*, (d) *The King v. Inhabitants of Erith*, (e) *Zouch v. Waters*, (g) *The King v.*

*Eriswell*, (h) *Whitelocke v. Baker*. (i) It was then insisted [\*155] that, this document being once admitted, \*the evidence which it furnished was strong and important, and sufficient, when coupled with hearsay evidence of declarations, and other circumstances, to justify the court in sending the question to be tried by a jury.

The general nature of the arguments urged on behalf of the crown may be collected from the judgment of the Lord Chancellor.

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*January, 22d.*—THE LORD CHANCELLOR:—After giving the fullest attention to the case, especially upon the matters of law which alone seem to require any particular deliberation, I have come to the conclusion that I ought, in this case, to direct an issue.

The grounds of the argument and of my opinion resolve themselves principally into two; that which relates to the admissibility of certain evidence, and that which relates to the

(a) 4 Campb. 401.

(b) 13 Ves. 140.

(c) 11 East, 504.

(d) 2 Mo. & P. 20.

(e) 8 East, 539.

(g) 12 Vin. Ab. 244.

(h) 3 T. Rep. 707.

(i) 13 Ves. 511. The cases are all collected in 1 Phillips on Evidence, 232—246, 7th edition.

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facts, including that evidence, namely, the weight of it, if admitted, and the other evidence in the cause.

The first consideration arises upon a document purporting to be an account prepared by a person of the name of John Troutbeck, a good many years ago deceased, who, from his own knowledge of the family, from communications with some of its members, and from the best information he was able to obtain, appears to have digested and to have reduced into writing an account of all that he could learn, and, heretofore, believed to be true, respecting his own relations.

The principal point in dispute was the relationship of two individuals of the names of Samuel and George Troutbeck. \*John was clearly proved to have been related [\*156] to one of those two, namely, to George: he was not

proved—and that was as much in dispute as the relationship of Samuel and George—he was not proved to have been related to the family of Samuel; and this documentary account was objected to, as not falling within the rule which admits hearsay or declarations of deceased persons in a question of pedigree, because (it was insisted) you must first give evidence *dehors* the declarations, to connect them with the parties respecting whom the declarations are to be tendered.

I entirely agree, that, in order to admit hearsay evidence in pedigree, you must, by evidence *dehors* the declarations, connect the person making them with the family. But I cannot go the length of holding that you must prove him to be connected with both the branches of the family, touching which his declaration is tendered. That he is connected with the family is sufficient: and that connection once proved, his declarations are then let in upon questions touching that family; not declarations of details which would not be evidence (as in one of the settlement cases referred to, where the very place of birth was sought to be proved, and Lord Ellenborough held they were not for that pur-



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pose receivable,(a) but declarations of the nature of pedigree, that is to say, of who was related to whom, by what links the relationship was made out, whether it was a relationship of consanguinity or of affinity only, when the parties died,(b) or whether they are actually dead—everything in short, which is, strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family, by the declarations of deceased persons who, by \*evidence *dehors* those declarations, have been previously connected with the family respecting which their declarations are tendered.

To say that you cannot receive in evidence the declaration of A., who is proved to be a relation by blood of B., touching the relationship of B. with C., unless you have first connected him, also by evidence *dehors* his declaration, with C., is a proposition which has no warrant either in the principle upon which hearsay is let in, or in the decided cases; and it plainly involves this absurdity, that if, in order to connect B. with C., I am first to prove that A. is connected with B., and then to superadd the proof that he is connected with C., I do a thing which is vain and superfluous; for then the declaration is used to prove the very fact which I have already established; inasmuch as it is not more true that things which are equal to the same thing are equal to one another, than that persons related by blood to the same individual are more or less related by blood to each other. It is clear, both upon principle and from the total want of any contrary authority in adjudged cases, or in the *dicta* of judges or text writers, that the argument fails entirely, which would limit the rule respecting evidence of this description to a greater extent than by requiring you to connect with the family, by matter *dehors* the declaration itself, the party whose declaration you receive.

Neither can I accede to another limitation, for which an argument was attempted to be raised, that the declarations them-

(a) *King v. Erith*, 8 East, 539.

(b) See the following case of *Kidney v. Cockburn*.

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Monkton v. Attorney-General.

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selves must be looked at, to see whether they are contemporaneous or not. I do not understand this restriction, now, for the first time, sought to be engrafted upon the rule, but I understand very well how absurd it would be, if introduced; how completely it would \*defeat the purpose for which [\*158] hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence. A person's declaration that his grandmother's maiden name was A. B., has never till this time been questioned as admissible, although it cannot by possibility be what is called a contemporary declaration, because no man can by possibility have contemporary knowledge of what his grandmother's name was before she was married. If, therefore, the word *contemporary* is to be added as a term of qualification to the subject matter of a declaration, in order to make it competent evidence, all such declarations would then clearly be excluded as go to facts, however well known in the family, which are the common matter of such evidence, and in cases of pedigree you never could go farther back than the recollection of the party swearing to the declaration of the deceased, and the life since the years of discretion, or the years when memory begins to operate, of that deceased person; a restriction which has never been acted upon by any judge, or sanctioned by any text-writer, and never to my knowledge before contended for at the bar.

It is then asked, shall we have no restriction whatever upon the admissibility of such evidence in respect to the subject-matter? I have already stated one important restriction, arising from the position in which the party whose declaration is received must necessarily stand to the family. Having once shown him to be a member of the family, by matter *dehors*, you may admit his declaration as to the relationship of any member of that family with any other, or as to the question (which comes to the same thing), whether a certain person is a relation of that family.

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[\*159] \*But is there no further restriction touching the subject matter, and touching the manner in which the declaration is made? Clearly there is, and nothing can be more satisfactory or more consistent with good sense, or with legal principle and decided cases, than the summary of the doctrine given by Lord Eldon in *Whitelocke v. Baker*.<sup>(a)</sup> His lordship there observes, that the admissibility of such evidence is founded upon the presumption that the words given in evidence are the natural effusion of the party, upon an occasion when his mind stands even, without bias to exceed the truth, or to fall short of it. I entirely agree that the words must be the natural effusion of the party, and that, generally speaking, he must have no bias upon his mind. But even here there must be a limit. It will be no valid objection to such evidence, that the party may have stood, or thought he stood (for that would equally bias) *in pari casu* with the party tendering the declaration, and relying upon it for the purpose of his own contention; for it has been decided, that although the party deceased, whose declaration you are giving in evidence, was *in pari casu*, and, if he had been living, might have stood in the shoes of the party who tenders his declaration in evidence, that is not sufficient to exclude it.

With the exception of what is said in *Drummond's Case*,<sup>(b)</sup> where the evidence was clearly inadmissible upon other grounds, I can find no warrant for asserting that if you tender the evidence of a man by way of hearsay in a case of pedigree (and of such cases only I am now speaking), that evidence is inadmissible when it comes from a person who stood *in pari casu* with

the party tendering it. Lord Tenderden, in *Doe v. Turner*,<sup>(c)</sup> \*states the law to be directly the other way, and he refers to a peerage case in the House of Lords, where the declarations of a deceased husband were given in evidence on the part of his son, although the husband was so far *in pari casu* with the claimant, that if the son was entitled to the peerage then, the husband ought to have been a peer like-

(a) 13 Ves. 511.

(c) 1 Ry. & Mo. 142.

(b) 1 Leach's Crown Cases, 373.

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Monkton v. Attorney-General.

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wise. A stronger instance of similarity of situation than this can hardly be conceived, and the case certainly seems to go a great way. But without pronouncing an opinion upon that decision, it is perfectly settled, both upon reason and authority, that the rule cannot be so far restricted as to exclude evidence, on account of the bias supposed to operate on the person making the declaration, in consequence of his being in the same situation, touching the matter in contest, with the party relying upon that declaration.

One restriction, however, clearly must be imposed; the declarations must be *ante litem motam*. If there be *lis mota*, or anything which has precisely the same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances, that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him, or for those in whom he takes an interest after his death, it is excluded, both upon principle and upon the authority of the cases, and among others of *Whitelocke v. Baker*. There is a still more distinct authority in the *Berkeley Peerage Case*, where Mr. Justice Lawrence adopts almost the very language of Lord Eldon in *Whitelocke v. Baker*, and where proceedings in equity having been instituted to \*perpetuate testimony, evidence of declarations was rejected upon the ground of *litis contestatio*. [\*161]

Subject to that limitation, therefore, the rule as to declarations is to be taken. And regard must also be had to the occasion on which the party has emitted them. Whatever applies to the evidence of a witness spoken in the box, applies equally to written declarations, provided they are brought home to the person supposed to have made them. Till then they are not declarations of one connected with the family. The occasion upon

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Moulton v. Attorney-General.

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which the declaration is made is, therefore, to be taken into the account.

It was then asked, as an argument for a further restriction of the rule, "If a man may sit down to frame a pedigree, how can you receive that pedigree in evidence like an ordinary declaration, when, *non constat*, he may not have been in the act of making evidence for himself, by preparing a document which should afterwards profit him, or those in whom he is interested?" To that I answer, show me that the pedigree in question was prepared with that view. Bring it within the rule either of *White-locke v. Baker* or of the *Berkeley Peerage Case*; prove that it was made *post litem motam*, not meaning thereby a suit actually pending, but a controversy existing, and that the person making or concocting the declaration took part in the controversy; show me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall then hold that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve. The question then always will be (and so far I agree with the argument for the crown), was the evidence in the particular circumstances manufactured, or was it spontaneous and natural? \*If I thought that this came within the description of manufactured evidence, manufactured for a purpose connected with the present controversy, I should of course at once have rejected it. But upon looking at it and examining it, I cannot, upon the whole, bring my mind to say that it was fabricated in such circumstances, or with such a view, as should bring it within the principle adverted to.

The competency of a pedigree as evidence in such questions has been frequently made the subject of comment, and even of judicial decisions.

One simple form of pedigree, or rather the heads of *memoranda* furnishing materials for a pedigree, is constantly admitted by every day's practice, I mean entries in family Bibles or other

books kept in the family. A memorandum book, an old almanac for instance, which is not so much open to all the members of the family as a family Bible is, has upon one occasion been received: but a family Bible is open undoubtedly to the family, which may be one ground of its admissibility; and I also find, on the authority of Lord Mansfield, that a pedigree is admissible to prove the facts contained in the pedigree, if it be hung up in the family mansion. A ring worn publicly, stating the date of the person's death whose name is engraved on it, and an inscription upon a tombstone open to all mankind, and erected or supposed to be erected by the family, are also received in evidence.

It is urged, however, and with considerable plausibility, that the principle of all these cases would exclude such a pedigree as this, which was not hung up or in any way made public, and to which it is not pretended that any one had access except the writer himself. But why is it that the publicity is relied upon in those cases? \*Why is it that the family Bible, the [\*163] public wearing of a ring, the public exposure of an inscription upon a tombstone, and the public hanging up of the family pedigree in the mansion, are all relied upon in respect of their publicity? It is because, in all those cases, the publicity supplies a defect, there existing, but not here existing—the want of connection between the pedigree, the tombstone, the ring, or the Bible, with particular individuals, members of the family. Why is it, for example, that a pedigree hung up in the family mansion is good evidence, although the person who made it is unknown, and is not proved by matter *dehors* the document itself, to have been connected with the family? Simply because of its being hung up in the mansion, where, the presumption is, it would not be suffered to remain, if the whole of the family did not more or less adopt it, and thereby give it authenticity. It is for that reason you admit such a pedigree without knowing who may have been the author. The present question, however, is simply this, whether the pedigree would not be admissible if, instead of being publicly hung up, it were kept in the repository

ries of one of the family, provided you can show that it is in the handwriting of a member of that family? In this respect the case before me is clearly distinguishable from those which appear to require the publicity of the document in order to make it competent evidence.

Adverting more particularly here to the authority of Lord Mansfield in *Goodright v. Moss*,<sup>(a)</sup> "An entry in a father's family Bible," says his Lordship, "an inscription on a tombstone, a pedigree hung up in the family mansion, are all good evidence."

What follows clearly shows that Lord Mansfield did [\*164] not consider \*publicity indispensable, and it is equally clear that he did not consider the circumstance of a man who makes a pedigree, or an entry, or a declaration in writing, or even a declaration in conversation, having an object in making it, provided that object be not connected with a controversy touching the matter in question, a sufficient ground to exclude such evidence. His Lordship's words are, "I have known advice given to a father and mother to make attested declarations in writing under their hand of the precise time of the birth of the bastard *eigne*, and the subsequent marriage, to prevent controversy in the family touching the inheritance." This may be said, perhaps, to be going great lengths; but at all events it sanctions the doctrine, that the having a distinct object in view, in making a declaration in writing or by parol, even though the object can only be gained by afterwards using the declaration in evidence, is not sufficient, *per se*, to exclude that declaration; for, continues Lord Mansfield, "If the credit of such declarations is impeached, it must be left to the jury to judge of it." In plain terms, if a father or a mother make a pedigree for the purpose of preventing disputes in the family, his Lordship says he will admit that pedigree in evidence even when those very disputes arise, because it was not made with a view to their own interest, but to preserve a *constat*, as it were, on record of facts peculiarly within their own knowledge (which is one of the

(a) Cowp. 591.

main grounds of admitting such hearsay declarations); and the observation that it was made for the purpose of settling family disputes, and may not have been so spontaneous and natural as some of the *dicta* of the judges would seem to require, shall only go to its weight and credit with the jury, and shall not preclude its admission by the court.

Another restriction was a good deal pressed, that you cannot mount, as it were, an hearsay upon an hearsay; but \*that what is given in evidence as hearsay must only [\*165] be of the first degree, so to speak; in other words, that after connecting A. with the family, it is competent, after his death, to give in evidence declarations made by A. as to what came within his own personal knowledge, but not declarations as to what he had heard respecting the family from others. There is no warrant, however, for any such distinction. The declarations tendered in evidence may either refer to what the party knew of his own personal knowledge, or, as is much more frequently the case, to what he had heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and that is the only mode in which the tradition in a family can be proved, and the subject matter of that tradition can be perpetuated in testimony.

This has been clearly held in *Athol v. Ashburnham*, a case decided in the fourteenth year of the reign of George II., and cited with approbation by Mr. Justice *Buller*, in his work on the law of *nisi prius*.<sup>(a)</sup> The declarations of a person connected with the family were there given in evidence as to what he knew and had heard, not of course as to specific facts unconnected with matter of pedigree, but—the subject matter of the declaration being a matter of pedigree, with respect to the relationship of parts of the family or the fate of members of that family—his declaration at second hand was received in evidence, as well to what he had heard, as to what he himself personally knew.

(a) Bull. N. P. 295.



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Monkton v. Attorney-General.

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Notwithstanding, therefore, the introductory part of this document, wherein John Troutbeck sets forth that he had collected the best information he could procure, that he had received some information from the testator, \*Samuel, himself, with whom he had at one time lived in the same country, and that he had only *heard* what he states, making use of the expression "it is said;" notwithstanding the circumstances which alone raise the ground of objection last referred to, I am of opinion, upon the whole, that the document, proved to be in the handwriting of John Troutbeck, who is certified by the Master to be connected with George, is admissible, and good evidence to go to a jury, with the view of connecting Samuel with George. All that has been said respecting the mistake into which the narrator certainly did fall as to the degree of relationship between them, all that has been said respecting the discrepancies between the narrative and the will, and the mistake of confounding Samuel the father with Samuel the son, I lay entirely out of view; for such observations apply not to the admissibility, but only to the credit of the document.

Coming now to the second branch of the question, to the effect, namely, of the evidence when admitted, I am decidedly of opinion that if this document is let in, and if the rest of the evidence in the cause, some parts of which very remarkably corroborate other parts of it, goes before a jury, there is a possibility, and something more than a possibility, that Samuel and George may be found to have been brothers, or nephew and uncle, and in that case the claim will be established. There is a perfect possibility, perhaps a probability, that the jury may find the other way. But this is precisely the case for an issue. The case, and the only case for refusing it, is, when there is reason to believe that the finding of the jury can be in no other way but one.

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Two issues were accordingly directed to try the question whether the claimants were the next of kin of Samuel [\*167] \*Troutbeck, the testator. The issues were tried at the

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York Spring Assizes in 1831, when the jury found a verdict for the crown.

A motion was subsequently made for a new trial; but the Lord Chancellor, after hearing Sir *E. Sugden*, Mr. *Pollock*, Mr. *Blackburn*, and Mr. *Starkie*, in support of the application, refused to disturb the verdict.

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KIDNEY v. COCKBURN.

1831: 15th, 21st and 31st July.

*Semble*, that in a pedigree case, statements contained in monumental inscriptions, and hearsay declarations made by a deceased relative, are competent evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other.

IN this suit, which was instituted for the specific performance of a contract for the purchase of certain freehold premises in the city of London, an important point respecting the extent to which hearsay evidence is admissible in cases of pedigree was very fully considered. The question arose upon the title of the plaintiff claiming as heir at law of a lady of the name of Christian Kidney, who died in 1826; and in order to make out his title in that character, it became necessary for the plaintiff to show that John Kidney, the plaintiff's grandfather, and David Kidney, the grandfather of Christian Kidney, who were admitted to have been the sons of one Jonathan Kidney, of Market Harborough, were born of the same mother. By an order of his Honor the Vice-Chancellor, affirmed by the Lord Chancellor on appeal, the parties were directed to proceed to a trial in the Court of Common Pleas upon the following issue: "Whether John Kidney and David Kidney, children of Jonathan Kidney, were brothers of the whole blood." Upon the trial it was established that Jonathan had been twice married; that his

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[\*168] first wife died in March, 1693, and his \*second wife in November, 1703 ; and for the purpose of showing that his sons, David and John, must have both been children of the first marriage, there were tendered in evidence, first, as to David (whose burial appeared from the parish register to have taken place on the 23d of December, 1750), certain inscriptions, one on an old tombstone in the cemetery, the other on a monumental tablet in the church of Market Harborough, wherein David was stated to have died on the 16th of December, 1750, at the age of 64 years. There were then tendered, as to John, (who, according to the entry in the parish register, was buried on the 9th of February, 1760), various declarations made by a deceased grandson of John, and also a letter written by the same grandson many years ago and sent by post to his brother, the plaintiff, stating that John, their grandfather, was seventy years of age when he died. The issue was tried before Chief Justice *Tindal*, who refused to receive the inscriptions, declarations, and letter, on the ground that, although admissible for the purpose of showing the relationship, they were not admissible as evidence to prove the ages of the several parties referred to therein, these being facts which the learned Judge was of opinion could not be proved by hearsay. The jury found for the defendant ; and his Lordship, as appeared from his note, was satisfied with the verdict, provided he was right in rejecting the evidence above stated ; but the note added, that if such evidence of the age at which the two children of Jonathan died ought to have been admitted and was believed by the jury, there would then be no doubt that John Kidney and David Kidney were brothers of the whole blood.

Sir *E. Sugden*, Mr. *John Campbell*, and Mr. *Wakefield*, moved for a new trial.

[\*169] \*The evidence in question was improperly rejected by the Judge who presided at the trial ; and if it had been admitted, its effect must have been decisive in the plaintiff's favor. There is no rule of law, which in cases of pedigree, limits the admissibility of evidence of that description to the mere pur-

pose of proving the relationship of parties: the particular nature or degree of their relationship, as uncle and nephew, cousins or the like, is as much a special fact as their ages at a given time or their comparative seniority; and it has never been contended that the statements on a tombstone, or the declarations of a deceased relative, are not good evidence upon those points. If admissible for one, they must be admissible for every purpose. Where is any rational line to be drawn? Neither in the cases, where the nature and effect of hearsay evidence have been discussed, such as *Goodright v. Moss*,<sup>(a)</sup> and *Voules v. Young*,<sup>(b)</sup> nor in the answers of the Judges to the third and fourth questions in the *Berkeley Peerage Case*,<sup>(c)</sup> has the distinction taken by Chief Justice Tindal been ever hinted at, much less recognized. The *King v. Erith*,<sup>(d)</sup> which may seem an exception, was considered rather as a settlement than a pedigree case, and is therefore distinguishable; besides, it has been overruled by *Higham v. Ridgway*.<sup>(e)</sup> In *Higham v. Ridgway* hearsay evidence was admitted as to the time of a person's birth. And *Herbert v. Tuckall*,<sup>(g)</sup> where, in order to prove a testator to have been under age, an almanac containing an entry by his father of the date of his son's birth was produced on a trial at bar, and admitted to be strong evidence, is an express authority to the same effect. In *Ryder v. Malbone*, lately tried before Mr. Justice Little-*dale* at the \*Stafford Assizes, an inscription on a tomb- [\*170] stone, stating the death of a party at the age of ninety years, was admitted evidence, and the age was in that case material.

The *Solicitor-General* and Mr. Cockburn, *contra*.

The ground of admitting the evidence in *Herbert v. Tuckall*, and *Goodright v. Moss*, was the peculiar means of knowledge to which the parent had access, as appears from Lord Ellenborough's observations in *Row v. Rawlings*.<sup>(h)</sup> The *King v. Erith*, how-

(a) Cowp. 591.

(d) 8 East, 539.

(g) T. Raym. 84; 12 Vin. Ab. 203.

(b) 13 Ves. 140.

(e) 10 East, 109.

(h) 7 East, 279.

(c) 4 Campb. 409.

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ever, is quite decisive, and has never been overruled or impeached. One of the inscriptions is a mere copy of the other; and as some of them are dated as late as 1770, and they are all apparently executed by the same hand, they cannot come within the description of *contemporaneous*. Neither are they set up in the view of the surviving relatives, the only principle on which monumental inscriptions are admissible, *Whitelocke v. Baker*; (a) for at the time referred to, all the members of the Kidney family had long ceased to have their residence at Market Harborough. How far is the relaxation of the strict rule to be carried? The silence of the books and the absence of authority on the subject, show beyond dispute that the doctrine now contended for is as new as it would be dangerous.

THE LORD-CHANCELLOR at the close of the argument intimated a very strong opinion in favor of the admissibility of the evidence, but said that as the point was one of some nicety, he he should reserve his judgment till he had time to consider it farther.

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*July 31st.*—His Lordship stated that his original impression was strengthened by the result of his farther consideration, [\*171] and by the concurring opinions of Mr. Justice Park and Mr. Justice Littleale, to whom he had submitted the point; but as the decision was a matter of great importance, with a view to future cases, he had come to the resolution of sending the question to the Judges of the Court of King's Bench, in the form of a case for their opinion.

The cause was soon afterwards compromised, so that no farther proceedings were had.

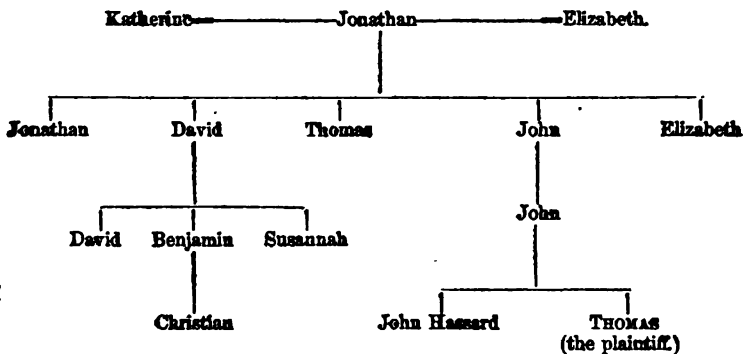
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The following is the material part of the order, as it was finally settled by the Lord Chancellor himself:

(a) 13 Ves. 511.

*Kidney v. Cockburn.*

After reciting the order made by the Vice-Chancellor for the issue, and that at such issue was tried on the 15th day of June last, when certain documents and matters offered to be given in evidence by the plaintiff were rejected by the court, and that a verdict was found for the defendant, to the effect that John Kidney and David Kidney were not brothers of the whole blood, the decree stated, as the allegation of the plaintiff's counsel, "That the plaintiff is desirous that a new trial should be had of the said issue, conceiving that the question in this cause is, whether the plaintiff Thomas Kidney is the heir at law of Christian Kidney in the pleadings mentioned? and so much of the pedigree is to be taken for admitted as shows that the plaintiff Thomas Kidney was the grandson of John Kidney the elder, and that the said Christian Kidney was the granddaughter of David Kidney the elder, and that the said David Kidney and John Kidney were sons of Jonathan Kidney of Market Harborough, deceased; and the question is, whether the said David Kidney and John Kidney were brothers of the whole \*blood? The [\*172] following is the pedigree as applicable to this question, omitting dates, and places of births, marriages, and burials :



Jonathan the son was buried in January, 1685, Katherine the first wife was buried in March, 1690, Elizabeth the second wife was buried in November, 1703. In order to show that David Kidney the elder was a son of the first marriage of the said

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Jonathan Kidney, the father of David and John, there is tendered in evidence an original inscription on a tomb in the cemetery of St. Mary, belonging to Market Harborough, which is as follows: "In memory of Mr. David Kidney, [who departed this life the 16th of December, 1750, aged sixty-four years]." There is given in evidence an examined copy of the burial register of the said David, whereby it appears that he was buried at Market Harborough on the 23d day of December, 1750; and there is tendered an examined copy of a monumental inscription in the church at Market Harborough, erected by Benjamin, a son of the said David Kidney the elder, which monumental inscription is as follows; that is to say—"In the cemetery of St. Mary, belonging to Market Harborough, are interred the remains of David Kidney, gentleman [who died the 16th of December, 1750, aged sixty-four years]; of David his eldest son by [\*173] Christian, sister of \*Sir Robert Kite, late Lord Mayor of the city of London [who died the 24th of November, 1770, aged thirty-three years]; and of Benjamin Kite, gentleman, brother of Sir Robert, [who died the 15th of July, 1747, aged forty two years]—in pious remembrance of a kind father, an affectionate brother, and an indulgent uncle, Benjamin Kidney, Esq., erects this memorial." There is given in evidence an examined copy of the baptismal register at Market Harborough of the said Benjamin Kidney, whereby it appears he was baptised the 15th of May, 1739. In order to show that the said John Kidney the elder was the son of the first marriage of the said Jonathan Kidney, the father of David and John, there is given in evidence the burial register of John, whereby it appears he was buried on the 9th of February, 1760; and there are tendered in evidence by a witness named Ann Kidney, the widow of John Hassard Kidney (the plaintiff's brother), declarations often made to her by her husband in his lifetime, that his grandfather, John Kidney the elder of Coventry (the brother of the said David Kidney the elder), was seventy years of age when he died. There is further tendered in evidence a letter written by the said John Hassard Kidney to the plaintiff Thomas Kidney, dated the 24th of April, 1788, and bearing the general postmark,

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in which the said John Hassard Kidney states the age of his grandfather, the said John Kidney, when his said grandfather died, to be seventy years. If the passages within the brackets in the said inscriptions on the tomb and monument are received, they would show by a reference to the age and time of death of David that he was born in the year 1686, and, consequently, that he was a son of the first marriage. If the said declarations made verbally and by letter are received, they would show by reference to the age of John at the time of his burial that he was born in the year 1690, and, consequently, that he was a son of the \*first marriage. The admissibility of the [\*174] passages in the monument not included in the brackets is not in dispute; and the question for the opinion of the court is whether the passages in the said inscriptions on the tomb and monument enclosed in brackets, and the said declarations offered to be proved by the witness Ann Kidney, and the letter of John Hassard Kidney, or either and which of them, be admissible in evidence to prove the pedigree in dispute? It was therefore prayed that a new trial of the said issue may be had; whereupon, and upon hearing, &c. His Lordship doth order that a case be made for the opinion of the Judges of the Court of King's Bench, and that the question be, whether or not the passages in the said inscriptions on the tomb and monument enclosed in brackets, and the said declarations offered to be proved by the witness Ann Kidney, and the letter of John Hassard Kidney, or either and which of them, be admissible in evidence to prove the pedigree in dispute," &c.



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 Stanton v. Hall.
 

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\*STANTON v. HALL.

1830: 13th and 15th December. 1831: 21st, 22d and 24th January.

Devise of lands to trustees upon trust, to pay the rents and profits to J. H. for life, but if he should attempt to assign the same, or should commit an act of bankruptcy, or become insolvent, then upon trust to pay thereout to the wife of J. H. an annuity of 100*l.* during his life, and after his decease, an annuity of 30*l.* during her widowhood, and upon certain other trusts as to the residue for the children of the marriage:

Held, that the annuity of 100*l.* was not the separate estate of the wife, but passed by the husband's assignment to a purchaser for value; and, that as against such purchaser, the wife had no equity for a settlement out of the annuity.

JOHN HALL the elder devised to trustees certain messuages, tenements, and hereditaments, whereof he was seised in fee, to hold the same unto the said trustees and the survivor of them, and the heirs of such survivor, upon trust to pay and apply the rents, issues, and profits of the said messuages &c., into the proper hands of his son John Hall, or to permit and suffer his said son to take and receive the said rents, issues, and profits, to and for his own use and benefit for his life, but so as the same should not be assignable by him or liable to his debts or engagements; and in case his said son should at any time become insolvent, and execute any assignment or other instrument for the benefit of his creditors; or should commit any act of bankruptcy, and be thereupon declared a bankrupt; or should assign over the said rents; then out of the rents, issues, and profits of his said messuages, &c., to pay and apply one annuity or clear yearly sum of 100*l.* unto the wife of his said son, in case she should be living, upon any of such events as aforesaid happening; the said annuity or yearly sum to be paid to her or her assigns for the term of the life of his said son; and after the death of his said son, upon trust to pay and apply one annuity or yearly sum of 30*l.* to her and her assigns, so \*long only as she [\*176]

(a) This and several subsequent cases, relating to the wife's separate estate, and the nature of her equity to a settlement, it has been considered expedient to report together.

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should continue his widow. And after any of such events as aforesaid happening, and subject to such annuities and charged therewith, the said trustees were to stand seised and possessed of the said hereditaments and premises, upon trust for all and every the children of his said son, in manner therein mentioned, with benefit of survivorship and accruer, &c.

On the death of the testator, John Hall the younger was let into possession of the devised estates. During his continuance in possession, he represented himself to be the absolute owner of the property; and in that character executed a deed, purporting to convey the fee simple of the devised estates to a mortgagee—a fraud which he was enabled to practise the more easily, as he bore the same name with his father the testator, and suppressed all mention of the will. Some time afterwards, John Hall the younger took the benefit of the Insolvent Debtors' Act; and this suit being then instituted by the incumbrancer for the purpose of enforcing his security over all the interest, whatever it might be, which John Hall the younger took under the devise, the question came ultimately to be, whether, in the event which had happened of John Hall's insolvency, his wife, upon the true construction of the father's will, was entitled to the annuity of 100*l.* to her sole and separate use, or whether it belonged to her husband, and was therefore in equity affected by the mortgage?

A motion was made on behalf of the plaintiff, that some person might be appointed to receive the annuity during the pendency of the suit; but the Vice-Chancellor refused the motion, at the same time intimating an opinion that, upon the words of the will, the wife must be considered as entitled to the annuity for her sole and separate use.

\*The application for a receiver having been renewed [\*177] before the Lord Chancellor, it was agreed, after some discussion, that as there was no evidence to be adduced in the cause, it would be expedient, for the sake of avoiding delay and expense, to argue the question upon the merits, and to consider

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the judgment given upon the motion as if it were the decree pronounced at the hearing, so as finally to decide the cause.

Sir *E. Sugden* and Mr. *Ching*, for the plaintiff, contended that the question was not what the testator by the particular form or phraseology of the limitations had intended to do, but what he had actually done. It was not enough to show a probable intention to exclude the *jus mariti* from the property of the wife: the language used must be sufficiently strong to prevent the possibility of its attaching; the object being to deprive the husband of his legal rights, by creating a separate beneficial interest in the wife, as if she were *sui juris*, in a manner unknown and repugnant to the principles of the common law. To effect such an object no particular form might be necessary, but the expressions, whatever they were, must amount to a total exclusion of the husband; as for example, the phrases "to the sole" or "to the separate use" of the wife, or "to be at her disposal" and "independent of" her husband. *Ex parte Ray*,<sup>(a)</sup> The case of *Johnes v. Lockhart*,<sup>(b)</sup> cited in *Ex parte Ray*, was misstated in the report; but the error was pointed out and corrected in *Wills v. Sayers*,<sup>(c)</sup> and the notion that a gift to a *feme covert* for her own use gave her a separate estate, was afterwards exploded in *Roberts v. Spicer*.<sup>(d)</sup> In *Packwood v. Maddison*,<sup>(e)</sup> a [\*178] legacy to a \*married woman, for her support, to be secured by an annuity, was held to vest in the husband, and pass by his assignment. The rule to be collected from all the authorities was, that in order to vest the property in the wife, to her separate use, the instrument must be so expressed as to be inconsistent with any other rational construction. There was, however, nothing irrational in supposing the existence of an intention which the testator had, from ignorance, neglected the proper means of executing,\* as appeared from an analogous case of frequent occurrence, where a clause of forfeiture failed of effect for want of the necessary limitation over. No case went

(a) 1 Madd. 199.

(c) 4 Madd. 409.

(b) Correctly stated in Mr. Belt's note,

(d) 5 Madd. 491.

3 Br. C. C. 393.

(e) 1 Sim. & St. 232.

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the length of deciding that a proviso, divesting a husband of a beneficial interest in property, and thereupon vesting it in the wife, should be construed as giving her the property to her sole and separate use: and courts of equity, which had already gone quite far enough in relaxing the strictness of the law on this subject, would not now be disposed to carry the relaxation further.

Mr. *Knight* and Mr. *K. Parker*, for the defendant, Mrs. Hall.

It is admitted that no particular form of expression is required, in order to vest a separate estate in a married woman to the exclusion of the marital right. Neither the word "sole" nor the word "separate" is indispensable. A direction that she shall hold what is given, independently of her husband, or that her receipt shall be a sufficient discharge, is equally effectual for that purpose; the question always being upon the intention of the donor, as it is to be collected from the whole instrument taken together, *Lee v. Prièaux*, (a) *Prichard v. Ames*, (b) *Ex parte Beilby*. (c) The objection that the \*defendant is here [\*179] seeking to defeat a legal right, does not apply; for the legal estate is in trustees, and the interest, whatever it be, which the husband and wife are to possess, is equitable only. The limitation is to the wife, in opposition and contradistinction to the previous limitation to the husband. The subject matter of the gift is, by express words, taken from him upon the happening of a certain event; and in words equally express, a portion of it is thereupon directed to be paid and applied to the wife during the continuance of the coverture; and at the husband's decease her allowance is to be reduced from 100℥. to 30℥. a year. All these circumstances raise an irresistible implication that the testator meant to bestow on Mrs. Hall, in the event which he apprehended and therefore provided for, of the son's bankruptcy or insolvency, a separate property in the annuity which she might employ at her discretion in the support of herself and her husband. Any other construction would be irrational and ab-

(a) 3 Bro. C. C. 381.

(b) T. & Russ. 222.

(c) 1 Gl. & J. 167.

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surd ; for, besides disappointing what was the obvious intention of the donor, it would render the clause of limitation over absolutely null. The conveyance made by John Hall the younger to the plaintiff, was *ipso facto* void ; and, by the express provision of the will, operated as a forfeiture of all his interest, for the benefit in part of the wife ; but what would that forfeiture and the limitation over avail, if the partial interest thereby vested in her, were to be instantly retransferred to the husband, in order to become once more, by a sort of equitable fiction, the subject of his original assignment ? Nothing could be more directly adverse to the avowed purpose of the testator.

Sir *E. Sugden*, in reply.

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\**Dec. 14th.*—THE LORD CHANCELLOR said it was clear [\*180] that no particular form of words was necessary in order to vest property in a married woman to her separate use. That intention, although not expressed in terms, might still be inferred from the nature of the provisos annexed to the gift ; as where, for example, the direction was that the property should be at the wife's own disposal, or that her receipts should be a good discharge ; circumstances which raised a manifest implication that the marital right was meant to be excluded. In the present case, however, nothing appeared upon the language or limitations of the will, from which such an inference could be safely drawn, and a receiver must therefore be appointed.

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1831 : *Jan. 21st and 22d.*—The cause was brought on again, for the purpose of having it determined how far Mrs. Hall was entitled to claim a settlement out of the annuity ; a point which had been postponed till the decision of the general question.

Sir *E. Sugden* and Mr. *Cling*, for the plaintiff, submitted, that as this was an annuity given to the wife for her husband's life

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only, and not a principal sum of money vesting in her absolutely, it fell clearly within the principle laid down by Sir J. Leach in *Elliott v. Cordell*; (a) a case less strong than the present, inasmuch as the wife there took an interest in the dividends of the stock bequeathed, during the continuance of her own life, whereas here the 100*l.* annuity was only given her for the life of her husband.

\*Mr. Knight and Mr. K. Parker, *contra*.

[\*181]

Till that case was decided the rule was laid down broadly, that the wife's equity for a settlement out of her *choses in action* must invariably prevail against assignees for valuable consideration, *Pope v. Crashaw*; (b) and it is impossible to suggest a reason why it should not apply to a life interest in such property as well as to interests of a larger description. *Elliott v. Cordell* first attempted to introduce the distinction, for which no previous authority can be cited, and which is entirely at variance with principle. The notion that a husband, by maintaining his wife, becomes, as it were, a purchaser of her life estate, and, therefore, capable of assigning it, was suggested in *Pryor v. Hill*, (c) before Lord Alvanley, but without success.

*Elliott v. Cordell* merely decided that the court would not, at the suit of a married woman, compel a settlement out of *choses in action* bequeathed to her for life, against the particular assignee: but the reasoning on which the judgment proceeds would justify a contrary decision in the present case; for the Master of the Rolls drew a marked distinction between an assignment by the husband to a purchaser for value, before he had failed in supporting the wife, and the general assignment in bankruptcy, from which his incapacity to support her followed as a necessary consequence. Here, the very act by which the title of the plaintiff was created constituted a forfeiture on the part of the husband, and deprived him of the means of maintaining his wife; so that

(a) 5 Mad. 149, and 1 Russ. 71 note.

(c) 4 Bro. C. C. 139.

(b) 4 Bro. C. C. 326.

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the plaintiff is to be considered rather in the light of a general than a particular assignee.

[\*182] *Jan. 24th.*—THE LORD CHANCELLOR:—This case involves the question how far a married woman, to whom an annuity for life was bequeathed in terms which have been adjudged not to vest it in her as her separate estate, is entitled to claim a settlement out of it, against one who was a purchaser for valuable consideration from her husband, the husband having afterwards become insolvent. And as *Elliott v. Cordell*, if it should be held to be law, decides the question, I have looked with some attention into that case, and also into the former authorities; and I find no warrant for supposing that *Elliott v. Cordell* introduced any new doctrine upon the subject. The same doctrine, in principle, was recognized long before by Sir W. Grant, although, undoubtedly, neither in *Mitford v. Mitford*,<sup>(a)</sup> nor in *Wright v. Morley*,<sup>(b)</sup> was the point raised and disposed of formally. It was, however, repeatedly referred to in those cases; and it is perfectly plain, from the language there used, that the opinion of Sir W. Grant would have excluded the wife's claim as against particular assignees. If the question were now for the first time raised, whether courts of equity had not gone farther than principle warranted, in allowing the claim against particular assignees, in cases where a capital sum was at stake, some doubt might, perhaps, be entertained; but in a case like *Elliott v. Cordell*, where the question related to a mere life interest, and where, prior to the assignment, there was no failure on the part of the husband to maintain his wife, the Vice-Chancellor would have gone a great step farther, had he listened to the argument in favor of the wife's equity.<sup>(c)</sup>

Reg. Lib. B. 1880, f. 917.

(a) 9 Ves. 87.

(b) 11 Ves. 12.

(c) In *Lumb v. Milnes* (5 Ves. 517), where a wife was declared to be entitled for life to the interest and dividends of a fund, a settlement was directed out of it, against the husband's assignees: so also in *Brown v. Clark*, 3 Ves. 166, and *Jacobs v. Amyatt*, 1 Madd. 376, n.

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\*TYLER v. LAKE.

[\*183]

1831: 13th August.

Lands were settled upon trust after the death of the settlor, to sell the same and distribute the proceeds among all the settlor's children *nominatim*; as to the shares of two who were married women, the trustees were directed to pay the same "into their own proper and respective hands, to and for their own use and benefit;" but in case they should be then dead, to pay their shares to their respective husbands for their own use and benefit: Held, that these shares did not vest in the married women to their separate use.

By a settlement executed in August, 1825, the honorable Catharine Tyler, widow, conveyed certain estates to trustees and their heirs, upon trust, immediately after her decease, to sell and dispose of the said estates, and after paying off the incumbrances affecting the same, to stand possessed of the surplus produce of such sale, and of the rents and profits in the meantime, upon further trust, to distribute the residue of the moneys to arise therefrom, among all the sons and daughters of the said Catharine Tyler, namely, John Tyler, Catharine, the wife of John Cooke, Betty Maria, the wife of John G. Anthony, Barbara Tyler, William Tyler, Caroline Tyler, Mary Jane Tyler, and Caroline Ann Tyler, if all of them should be then living, in equal proportions, share and share alike, but subject to the limitations and declarations thereafter contained concerning the same respectively (that is to say), as to the shares and proportions of Catharine Cooke and Betty Maria Anthony respectively, "in trust to pay the same into their own proper and respective hands, to and for their own respective use and benefit, in case they should respectively be living at the time of the decease of the said Catharine Tyler, or the time of payment or distribution of the said moneys;" but in case either of them should be then dead, then the share of such of them as should be then dead should be payable to their respective husbands, the said John Cooke and John G. Anthony, if then living, "to and for their own respective use and benefit absolutely," but in case they or either of them the said



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[\*184] John Cooke and John G. Anthony should also \*have departed this life, leaving lawful issue by their said respective wives, then their respective shares were directed to go over and be paid to and among their children respectively in manner therein mentioned. By subsequent clauses in the settlement, the shares of the four unmarried daughters were directed to be laid out in the funds or on mortgage, and the dividends and interest to be paid and applied to them or their assigns, "to and for their own proper and respective use and benefit," during their respective lives, with a power of appointment by deed or will. The share of the son, John Tyler, was in like manner directed to be invested, and the interest and dividends to be paid to him "for his own proper use and benefit," with certain remainders over in trust for his children. And lastly the share of the other son, William Tyler, was directed to be held by the trustees upon trust to "pay the same into the proper hands of the said William Tyler, to and for his own use and benefit," in case he should be living at the death of the settlor, but if he should be then dead, his share was to be invested upon certain trusts for the benefit of his wife and family as therein mentioned.

Upon the death of Mrs. Tyler, the settlor, a bill was filed to carry into effect the trusts of the settlement, and under a reference directed by the decree, the Master reported that Betty Maria, the wife of John G. Anthony, was entitled to one eighth part of the money which should be produced by the sale of the said estates, and to have one eighth part of the intermediate rents and profits paid to her, into her own proper hands, for her own use and benefit. To this report the assignees of John G. Anthony, who had, in the meantime, become a bankrupt, took an exception, on the ground that the \*bankrupt was entitled to the said one eighth share of the produce and rents, in right of his wife Betty Maria, and the Vice-Chancellor allowed the exception.(a)

Mrs. Anthony appealed from that decision.

(a) 4 Sim. 144, where the settlement is set out more fully.

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Mr. *Pepys* and Mr. *Girdlestone*, for Mrs. Anthony, contended that, looking as well to the general frame of the settlement, as to the very special nature of the proviso which accompanied the trust for the married daughters, there could be no reasonable doubt of the donor's intention to exclude their husbands from acquiring any interest in the settled property so long as those daughters were alive. This was clearly to be inferred from the subsequent limitation in the deed, whereby the husbands, in the event of their surviving, took by express gift the identical interest in the property which had been previously limited to their wives. *Stanton v. Hall*(a) had been strongly relied upon in the court below as negativing such an inference; but that case did not, like the present, contain a distinct clause, that the share of the wife should be paid into her own proper hands, to and for her own use and benefit. If any doubt remained upon the effect of the successive limitations, that clause must completely remove it. A gift to a married woman, to be paid into her own proper hands, could have no other possible meaning than that the payment should be made personally to her, and that the right to receive it should vest in her to the exclusion of her husband. *Hartley v. Hurle*(b) was a direct recognition of the principle. *Hovey v. Blakeman*,(c) *Lumb v. Milnes*.(d) It followed, as a necessary consequence, that she, and \*not the [\*186] husband, was the person competent to give receipts to the trustees, a direction which had always been held to vest a separate estate in the wife. The subsequent words, "to and for her own use and benefit," would, if that were required, come forcibly in aid of the construction given to the preceding passage; *Adamson v. Armitage*,(e) *Wills v. Sayer*,(g) and *Roberts v. Spicer*,(h) which apparently deny the effect of the word "own" in

(a) *Ante*, p. 175.

(b) 5 Ves. 540; and see 18 Ves. 434.

(c) 9 Ves. 524.

(d) 5 Ves. 517.

(e) 19 Ves. 416; Coop. C. C. 283; and see *Tyrrrell v. Hope*, 2 Atk. 558.

(g) 4 Madd. 409.

(h) 2 Rep. II. & W. 157—65, Jac. edition.

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a gift of this kind, turned upon the fact that there the testators plainly showed, from the language of other parts of the instrument, that they did not mean to use it in a strict sense. It was unnecessary to go through the cases, which were all ably collected in Roper;(a) but the general doctrine to be extracted from the whole was this, that the court would infer an intention to exclude the husband from any circumstances or expressions which were inconsistent with the full enjoyment of the marital rights. *Darley v. Darley*,(b) *Wagstaff v. Smith*.(c)

Sir *E. Sugden*, Mr. *Knight*, and Mr. *James Campbell*, who appeared on the other side, were not called upon to support the decree.

THE LORD CHANCELLOR :—The decision in *Stanton v. Hall*, referred to in the court below, was not come to without grave consideration; and it would stand unimpeached even if the judgment now under appeal were to be reversed. That decision has no application at present, except in as far \*as it sanctions the doctrine, that if a sufficient strength of negative words is not to be found in the gift or limitation, you are not allowed to fish about for indications of intention from other parts of the instrument: to that extent it is an authority for excluding any positive inference which might be drawn from the words here relied on—"as to the shares and proportions of Catharine Cooke and Betty Maria Anthony respectively, in trust to pay the same into their own proper and respective hands to and for their own respective use and benefit."

This clause is materially different in its expression, and may be said to be more exclusive than the language of the will in *Stanton v. Hall*. It consists of two parts, the direction to pay the rents and profits into their own proper and respective hands, and the direction that the payment shall be for their own respective use and benefit.

(a) 3 Atk. 399, but as to this case see 3 Bro. C. C. 384.

(b) 9 Ves. 520; and see *Dixon v. Olmuis*, 414.

With regard to the latter, I can easily understand the argument that the word "own" may, at one time, have been in law, to be synonymous with "sole:" but after it has been solemnly decided, as it was by the present Master of the Rolls, in *Wills v. Sayers*, and *Roberts v. Spicer*, that that expression standing alone, is not sufficient to exclude the marital right, and that in this respect "sole" is a phrase of greater efficacy, I should hold it to be a less sound principle of construction to return to what may have been the old rule, than to adhere to the authority of these modern cases.

Neither do I think that the direction which is superadded—"to pay the shares into their own proper hands"—either taken singly or in connection with the rest of the clause, is sufficient to create a separate estate in the wife. The only authority cited for such a proposition \*is *Hartley v. Hurle*, [\*188] which was a case under peculiar circumstances, and in which that was not the point principally considered. It is entirely a mistake to suppose that *Lumb v. Milnes* decided anything of the kind. The rule laid down long ago by Sir H. Grimston, when he said, in a case somewhat similar,<sup>(a)</sup> that where there were no negative words in the will to exclude the husband, he could not deprive him of his legal rights—a principle distinctly recognized in *Wills v. Sayers* and *Roberts v. Spicer*—is directly opposed to the construction here contended for. I take the principle, therefore, to be now thoroughly established, that courts of equity will not deprive the husband of his rights at law, unless there appears to be a clear intention manifested by the testator that the husband should be so excluded.

If these be the principles that regulate the construction of a will, how much more forcibly ought they to apply to a case like the present, of a limitation contained in a deed? I have looked into the authorities referred to of *Hovey v. Blakeman*, which bore some resemblance to the case at bar, and *Wagstaff v. Smith* where the bequest was to the wife, independent of her husband; but

(a) *Dakins v. Berisford*, 1 Ch. C. 194.

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in these, and in all the other cases, expressions will be found introduced which exclude the marital right in express terms, by giving the property to the wife's separate use; or (what has been held to amount virtually to the same thing), the donor annexes some direction or condition to the gift, in a manner incompatible with the existence of the husband's right. Of this nature are the phrases "to be at the wife's own disposal," or, "to be enjoyed independent of the husband," or, "her receipt [\*189] to be a good discharge." But here the rents \*may be directed to be paid into the proper hands of the wife, and yet she may be incompetent to give a receipt to the trustees. Probably the words were used without any very distinct perception of their meaning: (a) "proper" is the Latin form of the word "own," and can mean nothing more.

On the principle, then, which requires the husband to be excluded by expressions that leave no doubt of the intention, and which forbids the court to speculate on what the probable object of the donor might have been, and not on the authority of *Stanton v. Hall*, unless in as far as it sanctions that doctrine, I have no hesitation in affirming the Vice-Chancellor's judgment.

[\*190]

\*FENNER v. TAYLOR.

1831: 8th &amp; 9th February.

A husband, whose wife was entitled to a fund in court, signed a memorandum after marriage, agreeing to secure half her property on herself: Held (reversing the decision of the court below), that it was competent for the wife to waive this agreement, and that any benefit which her children might have taken under it was defeated by her waiver.

THE circumstances under which the question, in this case, came before the court, are correctly stated in Mr. Simons' Report, vol. 1, p. 169.

(a) It is to be observed that this opinion derives confirmation from the language of the gift to William Tyler, although his Lordship did not advert to that circumstance in his judgment.

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The Vice-Chancellor having decided that the agreement of the husband inured for the benefit of the children, and that the wife was incompetent to waive it, an appeal was brought from his Honor's judgment.

Sir *E. Sugden* and Mr. *Roupell*, for the appeal, observed that there were two points to be considered : first, whether the agreement which formed the basis of the proposed settlement, was a contract binding upon the husband ; and next, supposing it to be so, whether it could be waived by the wife, who was now willing that the fund to which it referred should be paid to her husband. The first point depended upon the effect of a voluntary agreement by a husband with his wife, made after marriage, and before any decree had been pronounced, affixing to the instrument a particular construction, or directing it to be carried into execution. The precise question was decided by Sir *W. Grant*, upon this identical agreement, but with reference to another portion of the fund ; for, on the 8th of July, 1813, an order was made at the Rolls, whereby it was directed that a legacy of 3,000*l.* should be paid to the husband, after an affidavit had been read to the court, stating that there was no settlement, or agreement for a settlement, unless the paper writing here referred to was to be construed \*as such.(a) In [\*191] this conflict of opinion between two eminent judges, it became necessary to consider how the matter stood upon principle. In an ordinary case the agreement would be of no value, and could not be executed, inasmuch as it contained no precise or sufficient description of the property to be settled. It was, besides, an instrument purely voluntary, and though it might possibly be enforced against the grantor, if made in favor of parties for whom there was a moral obligation to provide, such as a wife or children, still it could not be carried beyond the actual terms expressed in it, and these referred solely to the wife, who being alone interested, would surely have a right to forego the benefit, if she pleased. In point of fact, the wife never accepted,

(a) Reg. Lib. 1812, A., fol. 939, under the name of *Fenner v. Thompson*.

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and she now distinctly repudiated it; and if she took nothing under the agreement, much less could her children, whose only claim was derived through her, and who were never within the contemplation of the parties. The case of *Ex parte Gardner*,<sup>(a)</sup> relied upon in the court below, was very different in its circumstances, and had no application. That was the case of a husband undertaking to settle an estate of his own upon his wife and family in strict settlement, in consideration of obtaining the wife's property. The proposals, signed by both parties, had been carried in before the Master, and the court would not afterwards permit the husband to escape from his engagement, by accepting the waiver of the wife. The children were there provided for in express words: whereas here the memorandum was confined strictly to the wife, for whom only, therefore, the settlement (which would be to her sole and separate use) could be enforced. The Vice-Chancellor apparently considered this agreement as substituted \*for the wife's equity, and thence he drew an inference that the benefit of a settlement, made in pursuance of it, ought to be extended to the children of the marriage. But if it were a mere substitution, his Honor's argument was inconsistent: for, as a wife may clearly waive the benefit of her equity for herself, up to the last moment before the order for the settlement has been pronounced, and by doing so will defeat the equity of her children; the waiver of this agreement by the wife, ought, of course, to be equally effectual against the interests alleged to be created by way of substitution for that equity, *Murray v. Lord Elibank*.<sup>(b)</sup>

Mr. *Treslove*, *contra*, in addition to the cases cited on the former argument, relied upon *Barker v. Lea*,<sup>(c)</sup> as an authority to show

\* (a) 2 Ves. Sen. 671.

(b) 10 Ves. 84, and 13 Ves. 1. Where, however, the wife was a ward of Chancery, and the husband, after being committed for a contempt in marrying her, was liberated on undertaking to make a specified settlement, the court would not afterwards allow the wife to waive it, *Stackpole v. Beaumont*, 3 Ves. 89.

(c) 6 Madd. 330.

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that a married woman, having once asserted her equity to a settlement, cannot afterwards be permitted by any act of hers to destroy the rights which her claim has vested in her children. *Scriven v. Tapley*, (a) *Steinmetz v. Halthin*. (b)

THE LORD CHANCELLOR:—Before delivering my decision upon the question before me, it may be proper first to say a few words respecting the cases of *Ex parte Gardner and Murray v. Lord Elibank*, because considerable reliance was placed \*on the former, and because the reported judgment of [\*193] Sir W. Grant, in the latter, contains a remark which would seem to set Lord Hardwicke and Lord Eldon at variance. Upon looking into the report of *Murray v. Lord Elibank*, (c) when the cause first came before Lord Eldon, we find his Lordship laying it down clearly that although the wife, if she please, may call for a declaration that she is entitled to a provision out of the fund for herself and her children, it is, nevertheless, competent for her, even after an order for a settlement is completed, to waive that equity for herself and her issue. If a settlement be insisted upon, it must be for the benefit of the children as well as of the wife, but (to use his Lordship's words) "if the issue have a right against the father, it is dependent altogether on the will of the mother." In a subsequent stage of the same cause, Sir W. Grant observes, "It seems to be assumed in the argument, both here and before Lord Eldon, that it was competent to the mother to waive the settlement at any time before it was actually completed: that is, even after a proposal given in by the husband. Lord Hardwicke, however, determined the contrary, stating that though the wife might give up her interest in the money, if she pleased, yet nobody could consent for the children, which may be. That does not directly apply to this case: as, I believe, no proposal was laid before the Master in this case." (d) When we refer to what Lord Eldon says, he certainly

(a) 2 Eden, 337.

(b) 1 G. & J. 64. Where the children have been omitted in the settlement directed by the court, the omission, if it has been long acquiesced in, will not be supplied after the wife's death, *Johnson v. Johnson*, 1 J. & W. 479.

(c) 10 Ves. 84.

(d) 13 Ves. 5, 6.



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does not state in terms that if the proposal had been carried in, it might still be waived, although his language seems capable of that construction. But with respect to *Ex parte Gardner*, to which Sir W. Grant refers, as a contrary determination of Lord

Hardwicke, it is quite unnecessary for me to impeach [\*194] \*the authority of that case, for it differs most materially

from the case at the bar, inasmuch as the proposals which had there been signed by both parties, and sent in to the Master, expressly included a settlement on the family; a circumstance which of itself forms a marked distinction.

Without advertng to the grounds upon which his Honor rested his judgment in the present case, it is certain that the very question now submitted to the court has been already decided by his learned predecessor, and in this identical cause. His Honor, it is true, was not aware of that decision, for the language of his judgment is, "It is said, that a case *like* the present came before Sir W. Grant, and that he permitted the wife to waive the agreement; but the case not being in print, I am neither acquainted with the particular facts of the case, nor with the reasons upon which Sir. W. Grant proceeded."(a) With those facts, however, I am now fully acquainted. Instead of 270*l.*, the sum which is here in contest, the sum on the former occasion was of much larger amount; and all the circumstances which exist here, namely, the communications that took place with Taylor, and the memorandum of the 22d of December, 1810, which has been rather incorrectly described as a contract, being the memorandum which formed the foundation of the wife's equity, and which, it was said, she could not waive, must have been the very ground of Sir W. Grant's judgment. I must presume, therefore, that the exact question now before me was formally submitted to Sir W. Grant, and by him decided in the affirmative; and, consistently with that decision, I feel myself bound to reject the construction which his Honor has put upon this agreement.

(a) 1 Sim. 172.

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Fenner v. Taylor.

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\*The judgment pronounced upon that occasion, coming, as it did, from the same eminent Judge who had so recently considered the whole of this subject in the latter stage of *Murray v. Lord Elibank*, is entitled to no ordinary weight; more especially when it is recollected that Sir W. Grant carried the respect due to voluntary conveyances to its utmost limits, and that his decision in *Sloane v. Cadogan(a)* pushed that doctrine at least as far, perhaps I might say farther, than any of the preceding authorities had gone. Upon these grounds I am of opinion that the order of the court below must be reversed. [\*195]

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1883: *February*.—The cause came on again at the Rolls, upon a petition praying that another portion of the same fund might be paid out to the husband with the consent of the wife. On that occasion, the proceedings which had taken place before the Lord Chancellor were stated to his Honor, who expressed a wish that the petition should stand over, in order that he might consider the point farther, and have time to look into the authorities.

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*March 12th*.—THE MASTER OF THE ROLLS, in acceding to the prayer of the petition, observed, that when he refused the former application, he was not aware that the precise point had been already decided by Sir W. Grant, in this very cause, in favor of the wife's right to waive a settlement founded on the identical agreement here in question, and that that fact was first brought to his knowledge by the judgment of the Lord Chancellor. What-  
ever, therefore, his own individual opinion might be or  
\*might have been, he felt himself bound, on a petition [\*196]  
like the present, which was by the same parties, and  
arose out of exactly the same circumstances, to follow the de-  
cision pronounced by his Lordship, and to permit the husband,  
with the consent of the wife, to receive the benefit of the fund

(a) Sugd. V. P. Appendix, 817.

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Woodmeston v. Walker.

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now in question. Nevertheless, the reasons upon which he had formerly come to a different opinion (and to that opinion he still felt disposed to adhere), appeared to him to be of considerable weight, and he thought it his duty to restate them. In his view of the case, as the particular form of the settlement was not specified in the memorandum, a court of equity, if it were called upon to execute the agreement, would direct a settlement to be made in the ordinary form of marriage settlements; and the children, consequently, would be entitled to a benefit conformable to the usual course in such settlements. Although the Lord Chancellor and Sir W. Grant appeared to have considered that the agreement here was merely voluntary, and that a court of equity would not carry it into effect, it amounted, as it seemed to him, to a purchase, by the husband, of a wife's equity to a settlement, and could not be regarded as a mere voluntary instrument. His Honor added that, upon looking into the reports with a view to authorities upon this subject, he had found a case which was exactly in point, *Blois v. Lady Hereford*,<sup>(a)</sup> where it was expressly laid down that, under such circumstances, a husband was a purchaser of his wife's equity; and in his opinion, therefore, the agreement of Mr. Fenner was not without consideration.

[\*197]

## \*WOODMESTON v. WALKER.

Rolls.—1831: 15th February.—L. C. 12th and 15th August.

A testator directed that one third of his residuary estate should be invested in the purchase of an annuity for the life of a female, who was single at the date of the will and the death of the testator, and this annuity he gave to her separate use, and independent of any husband she might happen to marry, and without power to sell or assign the same by anticipation. The Master of the Rolls, upon the ground that the restraint against alienation or anticipation would be valid in case of future coverture, refused to order payment to the legatee of the price which would be paid for the annuity. But the Lord Chancellor held that she was entitled, if she chose, to the fund at once, without having it laid out, and that this option was not affected by the clause against anticipation.

(a) 2 Vern. 501, and see *Lloyd v. Williams*, 1 Madd. 450.

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THE testator, Henry Watson, disposed of one third part of his residuary estate in the following manner: "One other full and equal third part thereof I hereby direct to be laid out by my executors in the purchase of a government annuity for the life of my sister Rebecca Woodmeston; which annuity so to be purchased I hereby give and bequeath unto my sister Rebecca, to and for her own sole and separate use and benefit, and independent of any husband she may happen to marry; and I direct that her receipt or receipts, notwithstanding her coverture, shall be good and sufficient discharge and discharges for the same, and to be for her personal benefit and maintenance, and without power for her to assign or sell the same by way of anticipation or otherwise."

Rebecca Woodmeston was a widow at the date of the will, and had continued so ever since; and she filed the present bill, praying to have it declared that she was entitled absolutely to the one third part of the testator's residuary estate.

Mr. *Bickersteth* and Mr. *Bacon*, for the plaintiff.

It is an established principle of the court, that where an annuity is directed to be purchased, and the annuity, if purchased, might be immediately sold by the person to whom it is given, the annuitant is entitled to take \*the value of the [\*198] annuity, without going through the form of purchase. In this case the annuity, if purchased, might be sold by the plaintiff; for the clause against sale and anticipation is void, inasmuch as the plaintiff, at the time of the will and of the testator's death was, and still is a single woman. In the case of a bequest to a male, a restraint on alienation is of no effect unless the property be limited over, *Brandon v. Robinson*;(a) and the restraint, when imposed on a married woman, ceases as soon as the coverture is at an end, *Barton v. Briscoe*.(b)

Mr. *Pemberton*, *contra*.

(a) 18 Ves. 429.

(b) Jac. 603.

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Woodmeston v. Walker.

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In *Barton v. Briscoe* the will contemplated no marriage except that which was actually subsisting; and the opinion of Sir Thomas Plumer can be maintained only on the ground that it was not the intention of the testator to extend the restriction to future coverture. Here it is a future marriage which is guarded against. If alienation may be restrained in the case of actual coverture, why may it not be restrained prospectively with a view to future coverture? The testator has sought to throw a certain protection round the object of his bounty, in the event of her afterwards marrying; and the court is now called upon to defeat his intentions entirely.

THE MASTER OF THE ROLLS:—In the case of *Barton v. Briscoe* the restraint against alienation was, by the terms of the settlement, applied only to the actual coverture with the settlor which subsisted at the time, and it necessarily determined, therefore, upon his death. Here the restraint applies to the  
[\*199] \*coverture with any husband whom the annuitant may happen to marry.

If the plaintiff had been actually married at the death of the testor, it is admitted that the restraint would have been good; and the question is, whether a testator can impose such a restraint with respect to a future marriage? At law a wife can have no separate estate; and it is only by the principles of a court of equity that such an estate is permitted, for protection against the legal rights of the husband. To give full effect to that protection, the rule in equity permits a restraint upon the power of disposition, which would be invalid in any other case; and I cannot satisfy myself that there is any substantive distinction between a present coverture and a future coverture. It is a familiar case, that where the interest of a legacy is given to an unmarried female for life, to her separate use, in case of coverture, and the power of sale or anticipation is restrained, then, in case of a future marriage, and a sale or anticipation of the interest during the coverture, this court holds that sale or anticipation void, although by the terms of the will the life interest of the legatee is not

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limited over upon that event; and no right accrues by the prohibited act to any other person. That doctrine applies to the present case, where one argument is, that the plaintiff is solely interested in the annuity.

Upon the whole, in the absence of authority to support the claim of the plaintiff, I am not prepared to say that, upon the doctrines of this court, the power of disposition which is incident to property may not be restrained in the case of the future marriage of a female who is single at the time of the gift.

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\*August 12th.—The plaintiff, Mrs. Woodmeston, appeared from his Honor's decree, dismissing the bill. [\*200]

Sir E. Sugden and Mr. Bacon, for the plaintiff.

If the bequest of the annuity stood alone, the plaintiff's right to insist upon receiving the fund itself, in lieu of the annuity to be bought with it, would be indisputable; for the recent decision in *Dawson v. Hearn*,<sup>(a)</sup> where all the authorities were considered, has set that point at rest. The only doubt is, whether the clause against anticipation can effectually control this right, because the legatee happens to be a female, although she is unmarried and of full age. The case of *Dawson v. Hearn* went some way towards deciding that point also; for the argument drawn from the obvious purpose to secure a permanent provision for a widow, instead of giving her a gross sum, would apply equally in the present instance, and was there urged without success; although it must be allowed that the purpose of this testator is more strongly indicated, by the anxiety with which the language of his will has guarded against any imprudent wasting of the fund. But admitting the intention to be clear, the inquiry remains, has the testator resorted to the proper means for carrying that intention into effect? How stands the matter upon principle? At law,

(a) 1 Russ. & M. 606.

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every person who acquires an estate must take it with all its incidents; and one of the most essential incidents to the right of property is the power of alienation, which no clause or proviso can restrain or take away. And the same principle has been repeatedly recognized in equity; *Brandon v. Robinson*.<sup>(a)</sup> The object, therefore, can only be attained indirectly, by annexing the prohibited act as a condition, upon the happening [201] \*of which the original estate is to determine; and a new estate to vest in another party. Without such a gift over, the strongest words of prohibition are ineffectual.<sup>(b)</sup> The doctrine introduced by courts of equity, with respect to the interests of married women, so far from being an infringement of the principle, are perfectly consistent with it, and supply neither argument nor analogy in favor of his Honor's judgment. Lord Eldon, following Lord Thurlow, held that the interest which a married woman took in property settled to her separate use, was purely the creature of equity, which this court was therefore at liberty to mould and deal with, as might be deemed best for her advantage, or most agreeable to the wishes of the donor. Accordingly, with respect to property which is so settled, the court considers the wife as a *feme sole*, notwithstanding her coverture, and there, the restriction on alienation is allowed; whereas here, the plaintiff being a *feme sole*, and of course *sui juris* at law, the power of the court is not required for her assistance or protection, and the restriction cannot be effectually imposed. The very point was decided in *Barton v. Briscoe*,<sup>(c)</sup> where Sir T. Plumer held that the restraint on anticipation by a wife ceased upon the husband's death; and that decision was approved and followed by Lord Gifford. It may be said, that as the words of this proviso point to any future coverture, the restriction will attach upon the plaintiff the instant she marries a second husband, and that the court looking to that contingency, will protect the executors in their refusal to transfer the fund. For such a proposition, however, no authority can be adduced. The language

(a) 18 Ves. 429, and 1 Rose, 197.

(b) *Lear v. Leggett*, 1 Russ. & M. 690, and the cases there cited.

(c) Jac. 603.

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of the judgment in *Barton v. Briscoe* is directly opposed to it, and the existence of a desultory \*and shifting fetter [\*202] of that description is repugnant to legal principle, and would be attended with much practical inconvenience.

Mr. *Pepys* and Mr. *Kindersley*, for the executors.

After the decision in *Dawson v. Hearn*, it is too late to contend that executors have in general a right to invest the fund bequeathed for the purchase of an annuity, in defiance of the express wishes of the annuitant. But this is a peculiar case. The legatee is a female, and the clauses prohibiting anticipation, and excluding the rights of any future husband, prove it to have been the testator's settled purpose that an annuity should be purchased for his sister at all events. It is true, that where a father is anxious to deter his daughter from making an imprudent marriage, he may declare that, upon the happening of the apprehended event, the property which he bestows on her shall go over; but frequently this will not answer his purpose, for if, notwithstanding the forfeiture, the forbidden marriage takes effect, his child will be left destitute. For this reason clauses against anticipation are constantly introduced into settlements, which are intended to provide for females; and no distinction is ever taken with reference to the fact of their being married or single. The practice of conveyancers, who expressly exclude the control of any after-taken, as well as of any present husband, and the language of judges who have considered this subject, equally countenance the restriction in both cases; (a) it being a relaxation of the strict rule of law, grounded simply on the sex and condition of the party, which call for extraordinary protection against the importunities and influence \*to which cover- [\*203] ture, whether present or prospective, may expose her.

In *Barton v. Briscoe*, the prohibition was confined to the then subsisting marriage, and the judgment only decided, what nobody disputes, that, in the absence of a special restriction, a *feme*

(a) See what is said by the judges in *Bepble v. Dodd* (1 T. R. 193), a case which was not cited.



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*sole* stands in the same situation as a male. It is not to be denied that the instrument, whether deed or will, might divide the quantity of interest given into periods, so as indirectly to affect the desired result—by limiting it, for example, to the party so long as she continued a *feme sole*, with a direction that when she became covert it should vest, *toties quoties*, in trustees for her separate use, without power to anticipate. In substance that is done here. The plaintiff, therefore, would have power to dispose of her annuity till her marriage, and the instant that event took place, the restraint upon anticipation would attach.

It is quite immaterial, however, whether a shifting restriction of this kind is, or is not effectual; for the real question for the court is, what was the intention of the testator, as it is to be inferred from these peculiar provisions. There is nothing which prevents a testator from imposing it, as a necessary condition of his bounty, that the gift shall be taken in whatever form and mode his prudence or caprice may dictate; provided only, he express his purpose with sufficient clearness. Here it is impossible to doubt that the ruling idea in the testator's mind was, to secure to his sister for her life, a competent and permanent provision, which should give her no trouble in the management, which she should have little temptation to dissipate, and of which no after-taken husband should be able to deprive her.

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[\*204]     \*August 15th.—THE LORD CHANCELLOR:—The question in this case is, whether a prohibition against anticipation, annexed to a provision bequeathed to a woman for her separate use, notwithstanding any coverture, and she being at the time, and still continuing unmarried—whether that prohibition so modifies the nature of the property bequeathed, as to render the interest which she takes incapable of being aliened.

The rule of law which prevents a party from imposing fetters upon property inconsistent with the nature of the interest given, is precisely the same, I apprehend, in personal as in real

estate. Thus, where the subject is a personal chattel, it is impossible so to tie up the use and enjoyment of it, as to create in the donee a life estate which he may not alien: although the object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a event, or on a particular act being done; for in that case the donee takes by the limitation a certain estate, of which the event or act is the measure; and upon the happening of the event, or the doing of the act, a new and distinct estate accrues to a different individual. If a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the interest of the legatee, and create a new interest in another. In none of the cases bearing upon the subject (and they are very numerous) can any warrant be found for the proposition, that at law an inalienable estate can be created without any gift over. There is no gift over in the present case, which is that of a mere naked prohibition, not guarded by any clause of forfeiture.

\*In this court it has been held, that where property [\*205] is given to a married woman, to her sole and separate use, alienation may be prohibited in respect of the property so settled, without annexing any limitation over, to operate by way of defeasance of the first estate; and the ground on which that has been supported by Lord Eldon and Lord Thurlow, appears to be clearly consistent with itself and with legal principle, but to have no application to the present case.

*Baron and feme* being one person in law, no separate estate could, at law, be enjoyed by the wife against the husband, so as not to be liable to his engagements or control. Nor was it till after a considerable struggle (as appears from the language of Lord Cowper, in *Harvey v. Harvey*),<sup>(a)</sup> that courts of equity ventured to introduce a different doctrine, and to hold that personal chattels might be so given to a married woman as to vest in her

(a) 1 P. Wms. 125.

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alone, to the entire exclusion of her husband. That doctrine, however, has now been long established, insomuch that it has in later times become a regular mode of settling property on a *feme covert*, to convey it by such a form of words as shall expressly exclude the marital right, and place her, in respect of that property, exactly in the condition of a *feme sole*.

As the separate estate of the wife was thus the invention of equity, it followed, that the same court which invented, might mould and modify its own creation in whatever manner it thought fit. It is by force of the donor's intention, to which, in the case of a *feme covert* equity gives effect, that, contrary to the rule of law, a married woman is permitted to hold property in this peculiar manner. And it is strictly in accordance [\*206] with the same \*principle that equity allows such restrictions to be imposed on the separate interest thus given, as, by qualifying the extent of her dominion over it, may, in the judgment of the settlor or testator, best secure to the object of his bounty the full and uncontrolled enjoyment of the property for her own benefit. It was upon this ground that a proviso prohibiting the wife from aliening her separate estate, or a clause against anticipation, as it has been called, was first introduced in Miss Watson's settlement; upon this ground, the validity of such a proviso has been recognized by Lord Thurlow,<sup>(a)</sup> and subsequently upheld by Lord Eldon, in *Jones v. Harris*,<sup>(b)</sup> and various later cases; and it is now perfectly well established, that, with respect to personal estate settled to the separate use of a married woman, a clause against anticipation will be effectual so long as the coverture continues. No authority, however, can be found for the position, that a *feme sole* may be tied up and restricted in the dominion over her property, any more than a male, who is clearly incapable of being so restricted. The operation of the clause against anticipation, where there is no limitation over, rests entirely on its connection with the coverture, and on its being applied to a species of interest which

(a) See *Pybus v. Smith*, 3 Bra. C. C., and *Parkes v. White*, 11 Ves. 221.

(b) 9 Ves. 386.

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is itself the creature of equity. The present is not a case where there is a coverture, but a possibility only of coverture: and it would be going further than the authorities warrant, and be violating legal principle, to give effect to an intention of creating an inalienable estate in a chattel interest conveyed to the separate use of a *feme sole* (which estate, till her marriage, or after the husband's decease, she might otherwise deal with at discretion), simply \*because at some after period she [\*207] might possibly contract a marriage.

It was said that the woman might have the property at her own disposal till she married, and that when that event happened, a sort of postponed fetter might attach, a fetter which would fall off upon her husband's death, and be again imposed should she enter into a second marriage. That would be a strange and anomalous species of estate; nor is it very easy to conceive by what process or contrivance it could be effectually created, unless perhaps by annexing to the gift a limitation over to trustees, to preserve it for the woman during the successive covertures. But it is unnecessary to consider that question, as no such contrivance has been resorted to in this case. Here the bequest is merely coupled with a naked prohibition against alienation by the legatee. The decision in *Barton v. Briscoe*, where there had been a coverture, which was determined, proceeds strictly upon the principle adverted to; and upon the authority of that case, as well as the general principle and reason of the thing, I have no hesitation in stating that my opinion differs from that of the Master of the Rolls; and I must therefore hold that the plaintiff takes, at her election, an absolute interest either in the one third share of the testator's residuary estate, or in the annuity to be purchased with that share.

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On a subsequent day his Lordship decided that, in conformity with *Jenour v. Jenour*,<sup>(a)</sup> the costs of the suit should be borne

(a) 10 Ves. 562.

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Jones v. Salter.

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by the plaintiff's share, as that formed a distinct fund, clearly severed from the bulk of the residue.

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[\*208]

\*JONES v. SALTER.(a)

ROLLS.—1815: 25th May.

Bequest of dividends of stock to a *feme covert* for life, not to be subject to the debts or control of her then present or any other husband, and without power to charge or anticipate the growing payments thereof; Held, that the legatee, on becoming discover, might validly dispose of her entire life interest.

MARY BAKER, by her will dated 14th of January, 1802, gave to the defendant, her executor, 2,000*l.* 4 per cents., in trust, as to 1,000*l.*, to permit the plaintiff, Joshua Jones (since deceased), to receive the dividends for his life, and after his decease, in case the plaintiff, Ann Jones his wife, should survive him, in trust that she should receive the dividends for her separate use for her life; and as to the other 1,000*l.*, upon trust to pay to or authorize the plaintiff, Ann Jones, to receive the dividends thereof for her life, for her separate use; "and that the same, as well as the interest dividends, and produce of the said 1,000*l.* 4 per cent. bank annuities, so bequeathed in the event of her surviving the said Joshua Jones her husband, should not be subject to the debts, dues or demands, and be free from the control or interference of the said Joshua Jones, or of any other husband or husbands with whom she might at any time thereafter intermarry, and without any power to charge, incumber, anticipate, or assign the growing payments thereof." And the testatrix directed that the receipts of the plaintiff, Ann Jones, alone for the dividends should be a sufficient discharge: and after her death, in case the said Joshua Jones should survive her, upon trust to permit him

(a) The reporter is indebted to the kindness of Mr. Treslove for the note of this case, in which the point principally considered in *Woodmeston v. Walker*, ante, p. 197, was determined in the same way by Sir W. Grant.

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Brown v. Pocock.

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to receive the dividends for his life, and after the death of the plaintiffs, Joshua Jones and Ann Jones, \*upon [\*209] trust to divide the said sums of 1,000*l.* and 1,000*l.* 4 per cent. bank annuities among their four sons.

After the death of Joshua Jones, the husband, this petition was presented by the plaintiff Ann Jones, and the eldest son, who had attained twenty-one, stating that it would be of great benefit to the son to receive his fourth part of the 2,000*l.* bank annuities, and that his mother, the petitioner Ann Jones, was desirous of assisting him by giving up her life interest in the fourth part, and therefore praying a transfer of one fourth part of the said bank annuities; and Sir William Grant, then Master of the Rolls, after some consideration, made an order accordingly.

Some time afterwards a similar petition was presented by the mother and the second son, on his attaining twenty-one, for the like purpose, when a similar order was again obtained from the same Judge.

Mr. *Treslove* for the petitioners.

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\*BROWN v. POCKOCK.

[\*210]

1833: 23d and 31st May.

A clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her, after she comes of age and before marriage, from effectually assigning her whole interest in the legacy.

ANNE POCKOCK bequeathed to the defendants the sum of 6,000*l.*, upon trust to invest the money and stand possessed of the trust funds, and the interest and dividends, and apply one third of such interest, or a competent part thereof, in the maintenance and support of each of the three infant daughters of James E.

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Brown, and to accumulate the residue until the infants should respectively attain the age of twenty-one, when the whole of the interest was directed to be paid to them for their respective lives in equal shares; and in case any of them should marry, one equal third part of the trust funds was directed to be held in trust for the sole, separate and particular use of the daughter so marrying during her life, and the dividends and interest thereof to be paid to her accordingly, but not by way of anticipation, for her separate use; and after the decease of such daughter, her share of the trust funds was given to her children in manner therein mentioned; with benefit of survivorship among the other daughters, in case of the death of any of them, without having children who should live to obtain a vested interest in their mother's share.

The testatrix died in 1817; and a suit having been instituted for the administration of the estate, the legacy to the daughters of J. E. Brown was paid into court. Ann Elizabeth Brown, the eldest of those daughters, attained the age of twenty-one on the 9th of April, 1832; and in the month of June, following, she, in consideration of 400*l.*, advanced to her by John Hovil for the purchase of a redeemable annuity of 40*l.* 10*s.*, assigned [\*211] to Hovil \*all the interest which she took under the will of Anne Pocock, upon trust to secure the due payment of the annuity. In the month of October, in the same year, Ann E. Brown intermarried with Samuel Andrews; and Hovil shortly afterwards presented a petition at the Rolls, praying that the amount of his annuity might be ordered to be paid to him out of Mrs. Andrews' share of the trust fund. The Master of the Rolls declined to make any order upon that petition; and Hovil thereupon appealed to the Lord Chancellor.

Sir *E. Sugden*, for the petitioner.

The decision of this question must be governed by the judgment in *Woodmeston v. Walker*, (a) where the principle on which

(a) *Ante*. p. 187.

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restrictions imposed upon property taken by a *feme covert* are upheld in equity, was very fully considered, and were in strict accordance with that principle, and with the previous cases, your Lordship held it to be clear, that unless she be *covert* at the time when the interest vests, and the coverture be continuing down to the moment when the alienation is attempted, a female of full age stands precisely on the same footing with a male, and equally with him may exercise all the rights of ownership, notwithstanding a clause against anticipation. The assignment to the petitioner was executed by Mrs. Andrews after she came of age and before her marriage; and it will not be seriously contended, that her subsequent coverture could nullify an act originally valid. Even if the assignment had been made posterior to the marriage, *Newton v. Reid*(a) is an authority to show that that circumstance could not give force to a restriction which was nugatory and inept in its creation. In such a case the only mode of effectually \*preventing alienation is by a clause of forfeiture and [\*212] a gift over.

Mr. Pepys and Mr. Cooper, for Mr. and Mrs. Andrews.

In *Woodmeston v. Walker*, the legatee was of full age and was a widow, as well at the time when the bequest took effect, as when she asserted her claim to the entire fund; whereas at the death of this testatrix, when her interest in the legacy vested, Mrs. Andrews was an infant, and she is now a married woman. *Newton v. Reid* does not appear to have been much argued, and although that case was decided some time ago, it has only very recently been reported, so that it cannot yet be said to have received the sanction of the profession.

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1833: May, 31st.—THE LORD CHANCELLOR:—The point upon which this case turns, is the effect of a clause of anticipation in a will. The bequest was in trust for the infant daughters of J. E. Brown; a sufficient sum for their educa-

(a) 4 Sim. 141.



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Brown v. Poock.

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tion and maintenance to be paid out of the interest till they reached twenty-one respectively; and the whole interest of each share to be paid to each daughter for her life as she reached twenty-one, and in case of marriage then to her sole and separate use, *but not by way of anticipation*. One of the daughters attained the age of twenty-one in April, 1832, and in June, 1832, executed an assignment of her share of the interest to the petitioner, to secure the payment of a redeemable annuity of 40*l.* 10*s.* granted by her to him, in consideration of a sum of 400*l.*, money lent to her. In October she married; and her husband and she now join in opposing the application made by the grantee of this annuity to have the interest paid under [\*213] the assignment, \*or, out of the interest, the annuity, as it becomes due, and they oppose the application on the ground of the prohibition to anticipate. The Master of the Rolls appears to have regarded the matter in this light, for he refused to make an order on the petition. I cannot agree with his Honor. I consider the prohibition quite ineffectual to tie up the fund. There is no gift over; and the legatee was not a *feme covert*: she was not indeed a *feme covert*, either at the date of the will, or at the death of the testatrix, or at the date of the assignment. In order to support the view taken below, we must over rule all the cases, particularly *Barton v. Briscoe*(a) at the Rolls, *Woodmeston v. Walker* in this court, and *Newton v. Reid*(b) before the Vice-Chancellor.

An attempt is made to distinguish this case from these, but there is not even a probable argument for the distinction. In principle none of them differ, and one of them, *Newton v. Reid*, would be the same to the letter, except that it is a stronger decision than the one I am about to make. The fund was there directed to be invested in purchasing an annuity for an unmarried daughter, to her sole and separate use, in case she married, "but that she should not be at liberty in any way whatever to sell, assign, or in any way dispose of the annuity, or if she did so,

(a) Jacob, 603.

(b) 4 Sim. 141.

such sale to be void and of no effect; the testator's intention being, if any accident in life should unfortunately happen to her that she should be kept from want." She married; and then, jointly with her husband, assigned the fund, electing to take it and not the annuity; and it was assigned for money advanced to the husband. The court held the restraint upon anticipation void, there being no gift over. The particulars in which that case differs from the present make \*it much [\*214] stronger; for the prohibition is more particular and elaborate; and the assignment was not made, as here, while the legatee was a *feme sole*; and though the sum in question was considerable, the decision, which was in 1830, has been acquiesced in.

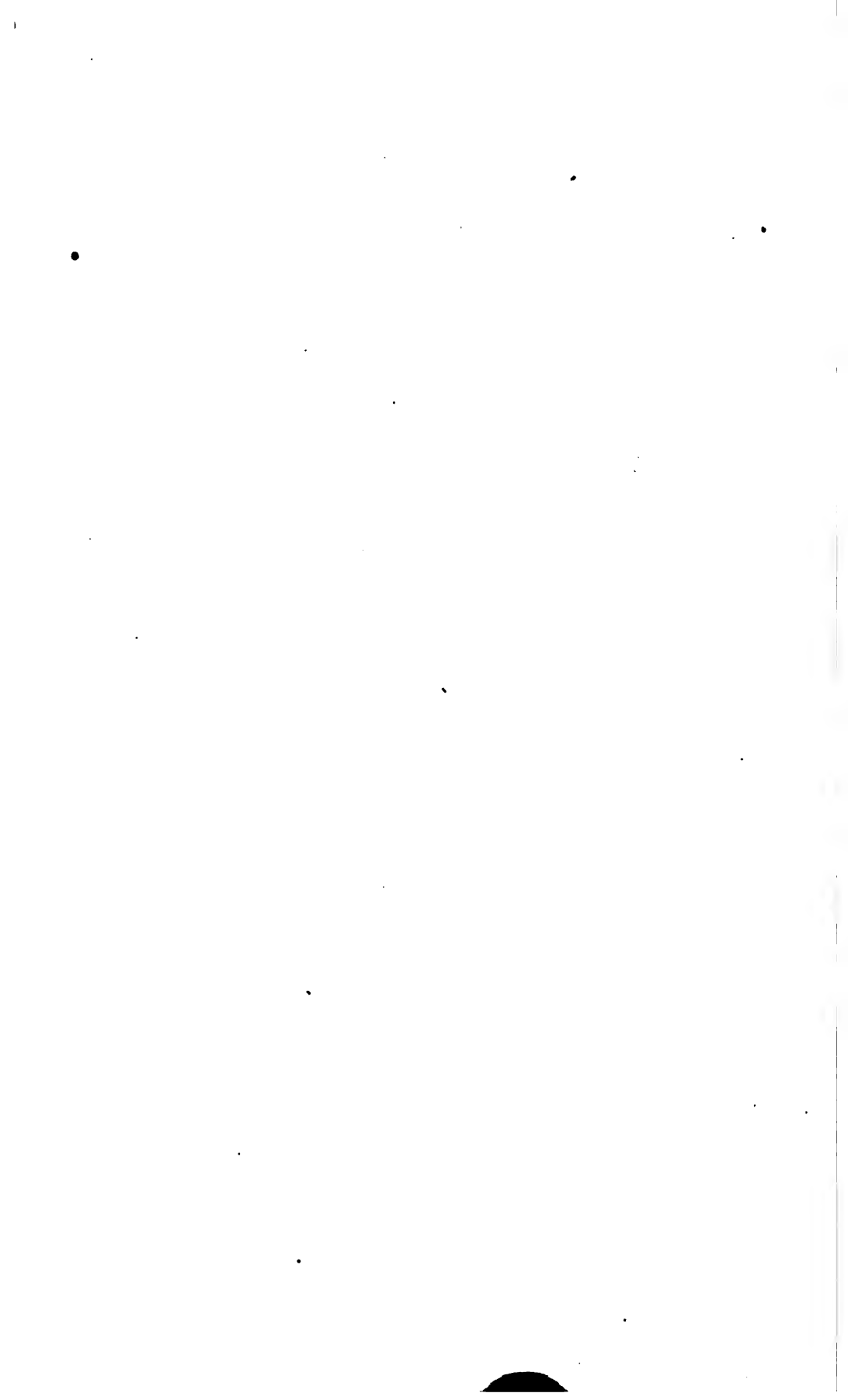
Having gone at large into the principles on which questions of this kind turn, in *Woodmeston v. Walker*, I should not now have entered upon the further discussion of the cases, had it not been contended that there the legatee was not married, whereas she is, in the present case. Upon the principle this can make no difference, the assignment having here been made when she was sole. But in *Newton v. Reid*, this difference did not exist.

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PAGE v. BROOM.

1830: December.

THIS case (upon which the argument and judgment in the court below are reported in 4 Russell, p. 6), was brought by appeal before the Lord Chancellor, who, after hearing the question elaborately argued, affirmed the decision pronounced by the Master of the Rolls.



# REPORTS OF CASES

ARGUED & DETERMINED

IN THE

## HIGH COURT OF CHANCERY.

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\*SALWAY v. SALWAY. - [\*215]

1831: 9th February.

A receiver appointed by the court is answerable for the loss of moneys consequent on the failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund.

A receiver paid into a banking house the sums he received, to the joint account of his sureties, under an arrangement with them, that all drafts upon the sums so paid in, should be written by one of the sureties, and signed by himself. The bankers having subsequently failed, it was held (reversing the judgment of the Master of the Rolls), that the receiver was liable for the loss.

THE facts out of which the question arose are stated in Mr. Russell's report of the case on the hearing at the Rolls.(a)

The executors of Mr. Salway presented a petition of appeal from the decision of his Honor the Master of the Rolls.

A preliminary objection was taken on behalf of the sureties, that as against them the court had no jurisdiction; but the Lord Chancellor was of opinion, that inasmuch as the objection had not been urged in \*the court below, it was [\*216] not competent for the sureties to insist upon it now;

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their submission to the jurisdiction at the Rolls having bound them to all intents, and including a submission to the appellate jurisdiction as an incident thereto.

Sir *E. Sugden* and Mr. *Wakefield*, for the appeal.

Mr. *Rose* and Mr. *Kindersley*, for the receiver.

Mr. *Loftus Lowndes*, for the sureties.

The following cases were cited: *Knight v. Lord Plymouth*,<sup>(a)</sup> *Fletcher v. Dodd*,<sup>(b)</sup> *Wren v. Kirton*,<sup>(c)</sup> *Massey v. Banner*,<sup>(d)</sup> *Ex parte Belchier*.<sup>(e)</sup>

THE LORD CHANCELLOR:—The case is shortly this. White was appointed a receiver in this court, and in order to prevail upon Adams and Burlton (who were not in partnership together) to become his sureties, he entered into an arrangement with them, by which it was agreed that the rents, when received, should be paid over to a person of the name of Anderson (who was a partner of the surety Adams), and be deposited by him at the banker's in the joint names of the sureties, and that all drafts upon the moneys so deposited should be written by Anderson; and signed by the receiver White.

The bank of Prodgers & Co., into which the money was so first paid, failed, and a considerable sum was thereby [\*217] lost to the estate. The funds of the estate were \*then transferred to another bank, that of Coleman & Morris, with regard to which a similar arrangement was adopted as to the payment of money and the drawing of sums out. The dividends received from the commission were deposited in that second bank, and all the new receipts under the receivership were paid to Coleman & Morris, in the same manner in which

(a) 3 Atk. 480; 1 Dick. 120.

(b) 1 Ves. jun. 85.

(c) 11 Ves. jun. 377.

(d) 4 Madd. 413, and 1 J. & W. 241,  
on appeal.

(e) Amb. 218.

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they had been formerly paid into the banking house of Prodgers & Co., before its failure. Coleman & Morris subsequently failed also; and the question is, whether ~~or~~ not the receiver himself, and in default of him, his sureties, should be made liable for the amount of the sum deposited with the bankers, or for the balance which the estate had lost by the double failure of the bankers.

A good deal of argument has been raised, touching the conduct of the receiver in respect of the balances kept in his hands, and the length of time during which he allowed them to remain there, and on the slowness with which he paid them into court; and it does appear, certainly, that though he may have rendered a yearly account, he nevertheless drew from the estate very considerable sums over and above the necessary outlay, which never much exceeded 800*l.* or 900*l.* a year, and he appears to have sometimes received other moneys without putting them in, although, at the time when the payments began, he had a sufficient balance in his hands to answer necessary charges. It is not to be said that a receiver, by merely complying with the exigency of the orders requiring him to account once a year, is thereby to be, of course, exonerated from responsibility; for that period is directed as the minimum of frequency in passing his accounts with the court. It is needless, however, to enter further into this topic, \*because the grounds upon [\*218] which my judgment proceeds are independent of that consideration.

After looking minutely into the circumstances and into the cases, I cannot conscientiously arrive at the conclusion to which the Master of the Rolls came, and I cannot help suspecting, though I am told that the point was pressed upon his Honor, that the consideration to which I am about to advert was never fully presented to his mind; the more so, as I find no trace of it in his judgment, and as it is extremely material, in my view, essential, to the right decision of the question. It is admitted on all hands, that if a receiver puts a fund out of his own con-

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This case, under the title of *White v. Bough*, having been carried by appeal to the House of Lords, the judgment of the Lord Chancellor was affirmed without costs, in the month of July, 1835.

[\*221]

\*AMPHLETT v. PARKE.

1831: January, 11th February.

A testatrix gave her real estates upon trust to be sold, and directed the moneys to arise from such sale to be considered and taken as part of her personal estate; she then willed, that out of the moneys to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and of the moneys arising from the sale of her real estate, upon trust for two persons and their children. Some of the pecuniary legatees having died in the testatrix's lifetime; it was held (reversing the decision of the court below), that the conversion of the real estate into personal, directed by the will, was not absolute, but partial only, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir at law.

MARTHA CLAY by her will, executed and attested so as to pass freehold estates, disposed of her property as follows: "I give and devise all my freehold and copyhold estates, in the county of Essex, unto and to the use of Nicholas Martyn, Esq., and Rawson Parke, Esq., their heirs and assigns, upon trust to sell the same either by public auction or private contract; and I will and direct that the moneys to arise from such sale be considered and taken to be part of my personal estate." After directing that the receipts of her trustees should be sufficient discharges to purchasers, the testatrix proceeded as follows: "And I do hereby will and direct, that out of the moneys to arise from such sale, and out of all other my personal estate, the several legacies hereinafter mentioned be paid and satisfied (that is to say):" &c. The testatrix then gave a number of pecuniary legacies to different persons by name; and among the rest, one of

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1000*l.* to Elizabeth Parke, and another of the like amount to Lydia Amphlett. She then continued in these words: "And all the residue of my personal estate, and of the moneys arising from the sale of my real estates, I give and bequeath to the before-named Nicholas Martyn, his executors, administrators, and assigns, upon trust to pay the interest thereof to the before-named Elizabeth Parke for her life, for her separate use, and after her death, upon trust to pay and divide the capital to, between \*and amongst all and every the child and child- [\*222] ren of the said Elizabeth Parke, born and to be born, equally share and share alike; the respective shares of the sons to be paid at twenty-one, and of the daughters at twenty-one, or marriage, which shall first happen, with benefit of survivorship between them, in the event of the death of one or more of them before such age or time as aforesaid, not only as to their respective original shares, but likewise as to all such share or shares as shall accrue to them respectively by survivorship; and if there shall be but one such child, then to such only child at such age or time as aforesaid: but in case there shall not be any child who, being a son, shall live to attain the age of twenty-one, or being a daughter, shall live to attain the age of twenty-one, or marry, then upon trust to pay the interest thereof to the before-named Lydia Amphlett for her life, for her separate use, and after her death, upon trust for all and every her child and children born and to be born, in such manner and with such benefit of survivorship as I have hereinbefore directed concerning the child and children of the said Elizabeth Parke; and in case neither the said Elizabeth Parke or the said Lydia Amphlett shall have any child who shall live to attain such age or time as aforesaid, then upon trust, as to one moiety, for the executors or administrators of the said Elizabeth Parke, and as to the other moiety, to the executors or administrators of the said Lydia Amphlett. And I appoint the said Nicholas Martyn and Rawson Parke executors."

The value of the legacies greatly exceeded the amount of the personal estate; and several of the legatees having died in the



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lifetime of the testatrix, the question in the cause was, whether the words of the will operated as an absolute conversion of the real estate into personalty, so that legacies given out of the produce of that estate, and having lapsed, fell into the residue [\*223] due, for the benefit of the \*residuary legatees, or whether the conversion was partial only, so that those legacies reverted to the heir.

The decree of the Vice-Chancellor, Sir John Leach, declared that the legacies which lapsed by the death of the legatees in the lifetime of the testatrix, sunk into and formed part of the personal estate, and that her heir at law was not entitled to any part thereof.(a)

His Honor, having afterwards heard a second argument on the minutes at the Rolls, adhered to the judgment he originally pronounced in favor of the residuary legatees;(b) and the heir at law appealed from his decision.

The question was again elaborately argued on the appeal by Sir E. Sugden and Mr. Rolfe, for the heir at law, and by the Solicitor-General and Mr. Boteler, for the residuary legatees. The cases relied upon in the arguments are all referred to in the Lord Chancellor's judgment.

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*February, 11th.*—THE LORD CHANCELLOR:—This case was argued before me at great length; a circumstance which I am far from regretting, because it involves a question of very great importance in point of law, with reference to the rights of the heir at law as contrasted with those of residuary legatees, and with reference to a series of decisions, apparently broken in upon by one or two cases, which in the court below have been made the foundation of the judgment now under appeal. Upon looking at the judgment of the \*Master of the [\*224]

(a) 1 Sim. 275.

(b) 4 Russ. 75.

Rolls, I find that his Honor felt considerable reluctance in deciding against the heir; and there is every reason to believe that, if he had closely examined the cases by which he held himself bound—those of *Mallabar v. Mallabar*,<sup>(a)</sup> and *Durour v. Motteux*,<sup>(b)</sup> which I have had an opportunity of consulting—the one in Mr. Coxe's valuable MSS. in Lincoln's Inn Library, the other in the original manuscript of Lord Hardwicke himself, from the collection at Wimpole—he would have found the doubts confirmed which have been entertained by the profession respecting the accuracy of those cases as reported in the books; and I feel persuaded, that if his Honor had been possessed of the same materials, he would have come to the same conclusion at which I have arrived, and which, from the course of his observations, his Honor appears desirous to have reached. I have endeavored to satisfy myself that we are not bound by those cases, when they are rightly considered and understood; and those cases alone prevented his Honor from coming to that conclusion.

This is a question arising upon a competition, as it were, between the heir at law and the residuary legatee, with respect to certain lapsed legacies. There is, first, a devise of all the real and personal estate to be sold; and all the moneys arising from such sale are to be considered and taken as part of the personal estate. These, generally speaking, are strong words. The testatrix then goes on: "And I do hereby will and direct, that out of the moneys to arise from such sale, and out of all other my personal estate, the several legacies hereinafter mentioned shall be paid:" again considering the produce of the sale and the personal estate to be confounded \*in one com- [\*225] mon mass of personalty. After the general clauses of devise in trust for the payment of the legacies, we come to what must be considered, in a question like the present, to be the operative part of the will; and this, as it is that on which the residuary legatee rests his claim, requires to be accurately weighed and sifted; for it signifies little what a testator may have said in

(a) Ca. T. T. 78.

(b) 1 Ves. Sen. 320.

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the introductory clauses, if he does not clearly maintain the same view when he comes to that part of the will which relates to the residue; that being, in effect, the title deed under which alone the residuary legatee takes, if he can take at all. And see how important the frame of this clause is, and how remarkably the testatrix has here varied her language: "And all the residue of my personal estate"—not stopping there, for if she had, it might have been contended that she meant to include under the phrase the moneys to be produced by the sales, the fruits of which she had said were to be so considered and taken, but—"All the residue of my personal estate, and of the moneys arising from the sale of my real estates." Now, moneys arising from the sale of real estates are here spoken of as something not identical, but rather put in contrast with the residue of the personal estate; a most material circumstance, which pressed much upon his Honor, and one which, but for the authorities of *Mallabar v. Mallabar*, and *Durour v. Motteux*, would evidently have led him to decide in favor of the heir.

Before going further, I have to observe, with reference to the strong words, directing the sale and conversion of the lands into money, and the produce to be considered as part of the personal estate, that to be sure it is to be so considered; and in the sense which I give to the whole will, that produce is so considered; not, however, absolutely, not to all intents and purposes, [\*226] but, as it were, *\*secundum quid*, relatively only, and severally, according to the subject matter; part of it to go in exoneration of the incumbrances on the real estate, part in payment of the debts and legacies, and the remaining part to inure by way of resulting trust, for the heir, as I think I shall show the rule of law to be, unless where the realty, or any part of it, has been clearly and completely taken from him.

When I say that the mere circumstance of directing that the produce of the sale shall be deemed personal estate, is not of itself sufficient to divest the heir, I am not without the authority

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of decided cases. In the *Countess of Bristol v. Hungerford*,<sup>(a)</sup> there was a devise of real estate to executors, to be sold for payment of debts, the surplus, if any, to be deemed personal estate, —the very words here. Nevertheless, the Lord Keeper, on general principles, decreed the surplus to be a trust for the heirs at law; and the decision was affirmed in the House of Lords. It is true the appeal was rather as to another part of the case; but the circumstance of the appeal gives some security for the correctness of Mr. Vernon's report on this point, although his general accuracy as a reporter is not always to be relied on.<sup>(b)</sup>

These words, then, are not sufficient to exclude the general rule of law; and the question, therefore, comes to be, whether there is or is not a complete disposition, an entire conversion, out and out, of the whole into personal estate, to all intents and purposes, or only so far forth as may be necessary to satisfy the purposes of the \*bequests in the will. [\*227] That is the single question. The rule is exceedingly well stated in a very learned and useful note to the report of *Cruse v. Barley*.<sup>(c)</sup> In that note Mr. Cox extracts the sound principle to be collected from all the cases, namely, that where the testator gives to the produce of real estate the quality of personality, to all intents, and that clearly appears from the whole will, the residuary as well as the introductory clauses, there the residuary legatee shall take; but that, if he has not so done, if he has only directed the conversion for the particular purposes mentioned in the will, then, although the residue is specifically bequeathed, the rule is otherwise. The residuary legatee, by force of the term, is to take all that is residue; but to say that he takes this (the produce of real estate, in the event not otherwise disposed of) *qua* residue, is only to beg the question. I deny that it is residue here.

(a) 1 Vern. 625.

(b) See 3 P. Wms. 194, note C, from which it appears that Mr. Vernon's report of this case is incorrect.

(c) 3 P. Wms. 20.

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The general principle appears to be, that the heir must be effectually displaced, that he is not to be displaced by inference or implication, but that there must appear a clear, substantive and undeniable intent on the part of the devisor or testator to exclude him; otherwise neither can the next of kin, as being entitled under the Statute of Distributions, take from the executor, nor can residuary legatees, whether they be the executors or specific legatees of the residue, take more than that which is in its nature residue, to the prejudice of the claims of the heir at law. And the executors will hold, as a resulting trust, whatever would have gone to the heir at law if he had not been excluded, the proof lying on the residuary legatee to displace the heir and substitute himself. Accordingly, all these cases turn, as they naturally must, upon what the particular will [\*228] has done; \*and to say that any positive rule of construction is laid down in *Mallabar v. Mallabar*, and *Durour v. Motteux*, is to speak without sufficiently considering, first, the subject matter of the supposed rule, as extracted by Mr. Cox; and, next, the general rule of law. For the inquiry upon these rules always is—has the heir at law, in each individual case, been sufficiently removed to let in the residuary legatee to that, which, whether it continues to be land, or whether it has been converted for a specific purpose into money, is only money till the purpose is answered or fails, and which, in the latter case, as a resulting trust, will then revert to the heir at law?

The first material case referred to upon this subject is *Cruse v. Barley*,(a) which certainly furnishes no authority for contending that that doctrine has ever ceased to be law in this court. That was a very strong instance of conversion, of dealing with the proceeds of the sale of the real estate, and confounding, as some of the cases term it, the realty and personalty together, putting them into one common fund: it is quite as strong as *Mallabar v. Mallabar*, and it was determined on great consideration. It

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was a devise of land to be sold, and also of personalty, and the money arising from the sale of real estate was to be divided amongst the testator's children, with 200*l.* to the heir at law at twenty-one, and "all the rest and residue thereof (that is, of the testator's personal and the produce of his real estate), among the other children when they attained the age of twenty-one years, with the benefit of survivorship among them." The case was fully argued, and very much considered; precedents were searched for, and time was taken to deliberate; and the Master of the Rolls was of opinion, \*on the general [\*229] principles of law, that the heir took, notwithstanding the conversion, after the purposes of the will had been accomplished, or in the event of any of those purposes failing.

I say nothing of *Maugham v. Mason*,<sup>(a)</sup> which goes precisely on the same principle as *Collins v. Wakeman*<sup>(b)</sup> and *Chitty v. Parker*,<sup>(c)</sup> where the next of kin and the heir at law were the only litigating parties in the field. This is not a contest between next of kin and an heir at law; and it is not pretended, that if there is no specific donee, the heir at law can ever be defeated by the next of kin. That is perfectly clear. Those cases, therefore, have no application. Besides the cases of *Cruse v. Barley* and *Digby v. Legard*,<sup>(d)</sup> another authority, to which, upon the argument in the court below, the attention of his Honor was not called, and which is entitled to the greatest possible respect, is *Gibbs v. Rumsey*,<sup>(e)</sup> before Sir William Grant. The words there were nearly the same as those which occur in *Green v. Jackson*,<sup>(g)</sup> of which I shall say a word hereafter, "Such part of the real estate," says Sir William Grant in *Gibbs v. Rumsey*, "as is given to charitable purposes (and which is void under the Statute of Mortmain) belongs to the heir at law, and does not go either to the next of kin, or the residuary legatee."

The question, then, comes to be, with respect to those two ex-

(a) 1 Ves. & B. 410.

(b) 2 Ves. jun. 683.

(c) 2 Ves. jun. 271.

(d) 3 P. Wms. 22, Cox's note, 2 Dick. 500.

(e) 2 Ves. & B. 294.

(g) 5 Russ. 35, p. 238, *infra*.

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cepted cases of *Mallabar v. Mallabar*,<sup>(a)</sup> and *Durour v. Motteux*,<sup>(b)</sup> by which his Honor, the Master of the Rolls, appears [\*280] to have thought himself bound. Upon \*looking into *Mallabar v. Mallabar*, I find that one great argument, which was urged on both sides, and to which the attention of the court appears to have been principally directed, was a pretension of a monstrous nature, viz., that to discover what was the legal meaning of certain phrases in that will, parol evidence was to be let in—evidence of the intention of the testator, as stated by him in conversations with the witnesses in whose presence he made his will. Lord Talbot, it is to be observed, admitted that evidence. In Forrester's report his Lordship is made to say, "If this was *res integra*, and I was at liberty to follow my own opinion, I should be very unwilling to admit such evidence; but as it has been done, and particularly in the case of *Doxey v. Doxey* and *Littlebury v. Buckley*,<sup>(a)</sup> I now admit it to be done." Then was read a deposition of a witness, who gave full evidence of the testator's declaration that the plaintiff, after payment of his debts and legacies, should have all the rest of his estate." How this could ever be admissible evidence it appears impossible to discover, but it may have influenced the decision of the learned judge; although the reporter adds, "The Lord Chancellor decreed upon the will itself, independently of the parol evidence, that here was no resulting trust for the heir, and that the executrix should have the whole residue, after the sale of the estate, both of the money arising by such sale and of the personal estate." I have looked into Mr. Coxe's notes in Lincoln's Inn Library, where I find a much more full and accurate account of that case; and it turns out that there was a very material circumstance, which was shortly alluded to at the bar, and which is not to be lost sight of—there was a legacy of 500*l.* expressly [\*281] given \*out of the fund to the heir at law.<sup>(a)</sup> That legacy, Mr. Fazakerly argued, was a most important bequest, as raising an implied presumption against the heir, especially when coupled with the fact of the testator's leaving to his sister scarcely

(a) Ca. T. T. 78.

(c) Cited 2 Vern. 677.

(b) 1 Ves. sen. 430.

(d) This legacy is mentioned in Mr. Forrester's report.

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anything but a burden, unless, upon the general scope and effect of the will, she was to take beneficially in her character of residuary legatee; and he relied on the way in which the particulars of the property, the lands, the houses, the tithes, the rent charges, and the various provisions respecting them, were minutely recited and detailed, as proving that the testator, at the time, had the whole of his property in his eye. All these different particulars the testator carefully enumerates; he directs them to be converted into personalty, and put into one fund, and out of that fund the legacy to be paid to the heir; and he then goes on to mention his sister, the residuary legatee, as the special object of his bounty. Taking all these circumstances together, the court may very possibly have held that there was enough, on the face of the instrument, to establish a clear intention to displace the heir at law; for Lord Talbot says: "The testator intended that the whole of the real estate should be turned into money; and the question was, whether the moneys arising from the estate sold should go to the heir at law." He then observes on the fact of the 500*l.* legacy, and adopts Mr. Fazakerly's argument to its fullest extent, making it, in a great measure, the ground of his decision. That gives a very great speciality to the case; and though I am not to reconcile it with *Cruse v. Barley*, there is still enough to differ it from that case, with which, possibly, it may stand, and enough to show it was decided on the apparent intention to displace the heir, in accordance with the rule which I have stated to \*be extracted from [\*232] all the cases, that you must clearly prove that the heir at law is excluded; that the words prevent the possibility of considering anything to be left as a resulting trust for him; and that the burden of such proof lies upon those who claim in opposition to him.

It is not at all inconsistent with that rule, but rather flows from it, and I agree in holding, that a testator may provide, not only that the undisposed residue, which is strictly personal, shall go to the residuary legatee, but that all lapsed legacies, of whatever nature, shall also go to him; and that, if it is clear, there-



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fore, from express words, that he gave him the lapsed legacies that were to be raised by the sale of real property, and failed in consequence of lapse, mortmain, or any other cause; if he says, for instance, "I give all the lapsed legacies as parcel of my residue to the residuary legatee," *cadit questio*, there is no doubt he may; and if he can do it by express words, he can do it by plain and obvious intention, to be gathered from the whole instrument.

If you once arrive at the conclusion that the testator has displaced the heir, then, of course, the lapsed fund falls into the residue by express intention: and so I take to have been the feeling of Lord Hardwicke, from what I see of his judgment in the case of *Durour v. Molleux*. On comparing the statement of the will in that case as set out in Messrs. Simons' and Stuart's Reports,<sup>(a)</sup> with the very incorrect and slovenly note of it in Vesey, it is perfectly clear that the will was so framed as to make that an exceedingly probable intention; as Lord Hark-  
 [\*233] wicke at once perceived. The testator enumerates \*very minutely his whole property, leaseholds, freeholds, money, securities, bonds, stock both at home and abroad, plate and linen, and all he had or might have any claim to, of what kind soever, and so forth, and directs that the residue, being personalty, should be invested in government or other securities in the names of his trustees, on trust, and that the whole produce, be it what it may, should go to the last survivor for life (for he gave it out in life interests only); and to pay the residue and the principal unto and among the respective children and so forth; and the remainder of his estate being placed out at interest in some of the funds, then he directs it to be dealt with in like manner. Now, undoubtedly, from this it might be more easy to collect the intention, than from the short note in Vesey, and to contend it was the express design of the testator to give the whole, whatever it might amount to, and whether consisting of such parts of his property as were previously undisposed of, or of surplus produced by the sale of real estate, as to which his

(a) 1 Sim. & Stu. 292, note.

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purpose failed in consequence of mortmain or otherwise, to those persons who are the particular objects of his bounty.

On looking further into the case, however, you will find that this, though the only point in the cause which bears upon the present question, was not much discussed at the bar; and certainly not much considered by the Judge. The great contention there was, whether a certain gift, said to be mortmain, was mortmain or not. The argument turned mainly upon that; and although Lord Hardwicke's manuscript book, now lying before me, contains an entry making some reference to the conflicting claims of the heir at law and residuary legatee, and gives the substance of the argument of counsel, yet when his Lordship comes to deliver his own judgment, he directs it entirely to the question of mortmain, \*as if that were almost the [\*234] only subject to which his attention was particularly called. So that it happens here, as it often happens in cases of importance, that where one point in a cause is of main consideration, and another comes in only by the by, after the former has engrossed the attention of the court, it is at once assumed, and slurred over and disposed of hastily. The question of mortmain appears to have been argued with great learning, and was strongly present to his Lordship's mind; and, indeed, all he says respecting the other point is, "I hold the bequest of 1,200*l.* to be, under the Mortmain Act, void," and then he states one or two grounds on which he so held it, "and, therefore," he concludes, "it shall fall into the residue of the testator's estate, and be divided according to his will." Now really I do not at all deny that: I agree that it falls into the residue of the testator's estate, and should be divided according to his will. This would leave it quite in doubt whether Lord Hardwicke meant the heir at law to take the residue: but on examining the Registrar's book, it appears that the decree was drawn up as if the residuary legatee, and not the heir, took it. The report in Vesey(*a*) cannot be correct. Lord Hardwicke is there represented as saying that the cases on the subject

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differed, but the last determination he believed was in favor of the heir at law. Now that is not the way in which a learned and accomplished lawyer like Lord Hardwicke would have treated so grave a question; it is precisely the way in which an unlettered and ignorant man would have spoken. Lord Hardwicke knew well that it was in *Arnold v. Chapman*(a) he had previously decided in favor of the heir; and it is impossible to conceive that

his Lordship, who but a year and a half before had de-  
[\*235] termined that case upon \*great consideration, and who

had then thoroughly discussed the question, and distinctly laid down the legal doctrine, should have decided as he is here represented to have done, if his attention had been sufficiently drawn to the point; least of all, is it conceivable that he should have treated the decision in *Arnold v. Chapman* as a mere chance *dictum*, as if that capriciously gave it to the heir, and now it was the turn of the residuary legatee. In *Arnold v. Chapman* copyhold estate was given to A., on condition that he should pay 1,000*l.* to the executors upon trust for a charity. This his Lordship held clearly to be a shift to evade the Mortmain Act, and therefore not to be allowed. His words are—"the heir at law then is entitled by way of resulting trust, because this 1,000*l.* is mentioned by way of condition on the devise of the real estate, and is to be paid to the executors; and to be sure if wanted for debts it would vest, and must be admitted by the executors, for that purpose only, to be turned into personal estate. But the Act has prevented this transmutation for the benefit of the hospital, and then it remains part of the real, undisposed by the will; for the executors take it only as trustees, and any part or profits of the real estate undisposed will be a resulting trust for the heir."

Last of all comes the case of *Green v. Jackson*,(a) where his Honor decided as he had previously done in the present case, and relied upon the same authorities. In *Green v. Jackson*, all the property is marked with the most minute and specific enumeration, to be laid out and formed into a particular fund. And

(a) 1 Ves. sen. 108.

(b) Russ. 35, p. 238, *infra*.

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 Amphlett v. Parke.
 

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how does the testator deal with that fund? It is to be formed at a certain time, under certain circumstances, and vested in \*the executors for certain purposes: "And I [\*236] do direct that my said trustees, &c., shall pay and apply all the residue of the moneys which shall then be in their hands, unto and among all the children," &c., that is, the residuary legatee. His Honor held there, on the peculiar language of the instrument and the authority of *Durour v. Motteux*, that there was an express intention to give the whole, from whatever source arising, whether from lapse or otherwise—all the money then in their hands, after particularly describing and specifying how it was to come into their hands, and how and for what purposes they were to keep it—among the children, the residuary legatees. *Green v. Jackson*, therefore, does not appear to be at all in discrepancy with the other cases professing to be founded on *Durour v. Motteux*.

A good deal was said of *Ackroyd v. Smithson*,<sup>(a)</sup> chiefly on account of Lord Eldon's most able argument in that case: but the case has, in fact, no application; for the contest there lay, not as here, between the heir and residuary legatees, as might at first be supposed, but between the heir and the next of kin, each claiming, as undisposed of, a lapsed share of residue, the produce of real estates directed to be sold. As to that, there can be no doubt; for it is admitted on all hands, that unless the next of kin is made a specific donee, he never can stand in competition with the heir at law. With respect to the case of *Kenell v. Abbott*,<sup>(b)</sup> before Lord Alvanley, a judge whose deservedly high authority pressed me very strongly, I can only say, that he appears there to have proceeded on the common understanding of *Durour v. Motteux*, a case which, from the circumstances already mentioned, seems to have been generally misconceived.

In reversing the judgment of the Master of the Rolls, [\*237] it is a great satisfaction to me to find that his Honor

(a) 1 Bro. C. C. 503.

(b) 4 Ves. 802.

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Green v. Jackson.

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plainly intimated his own opinion to be against the decision to which, on the authority of the cases, he thought himself bound to come. I have endeavored to show that the effect of those cases has not been correctly understood, and that they are not binding upon the court; but it is so anxious and alarming a matter to be called upon to depart from what a judge like Lord Alvanley seems to have considered as settled by authority, that I have deemed it necessary to state my reasons at large, which must be my apology for having taken up so much of the public time.

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A petition of appeal was presented to the House of Lords against this decision; but the appeal was compromised before it came to a hearing, the heir and the residuary legatee dividing the fund between them.(a)

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[\*238]

\*GREEN v. JACKSON.

1831: 27th April. 1835: 15th January, 1st April.

Where a testator directed his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gave the residue of the mixed fund to A. and B., the failure of the charitable legacies was held to inure to the benefit of A. and B. Affirmed on appeal.

THE will of Joseph Chapman, upon which the question in the cause arose, is stated by Mr. Russell in his report of the case upon the hearing at the Rolls.(a) The property comprised in the bequests, which failed in consequence of the operation of the Mortmain Act, consisted partly of freehold and partly of leasehold estates.

THE MASTER OF THE ROLLS having decided that the failure of the charitable legacies given by the will inured to the benefit

(a) See *Phillips v. Phillips*, 1 Mylne & Keen, 653, 660.

(b) 5 Russ. 35.

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Green v. Jackson.

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of the persons described in the residuary gift, the heir at law, and some of the next of kin of the testator joined in presenting a petition of appeal against his Honor's decision.

This petition came on to be heard before Lord Chancellor Brougham in April, 1831, when the appeal was fully argued, by Mr. *Agar*, Mr. *Preston*, and Mr. *Duckworth*, on behalf of the heir at law; by Mr. *Lynch*, on behalf of the next of kin; and by the Solicitor-General (Sir *W. Horne*), and Sir *Edward Sugden*, on behalf of the residuary legatees. In the course of the discussion considerable reference was made to the decision of his Lordship in the recent case of *Amphlett v. Parke*,<sup>(b)</sup> which, while it was strenuously represented on the one side, and as strenuously denied on the other, to have a direct and conclusive bearing on the question before the court, was stated to be likely in the course of a very short period, to be brought under the review of the House of \*Lords, in conformity with his Lordship's suggestion. When the counsel for the respondents had concluded their argument, the Lord Chancellor said, that having regard to his decision in *Amphlett v. Parke*, and to the peculiar situation in which that case stood, he was disposed to postpone his decision in *Green v. Jackson*, until the judgment of the House of Lords upon the pending appeal in *Amphlett v. Parke* should be pronounced. [\*239]

Circumstances subsequently occurred which induced the parties in the cause of *Amphlett v. Parke* to come to a compromise of their conflicting claims; the appeal to the House of Lords in that case was abandoned;<sup>(b)</sup> and Lord Brougham having resigned the Great Seal before any arrangement could be made for having the appeal in *Green v. Jackson* reheard and finally disposed of, that appeal was now set down, upon a special application, to be re-argued before his successor, Lord Lyndhurst.

1835: January 15th.—Mr. *Agar*, Mr. *Preston*, and Mr. *Duckworth*, for the appeal.

(a) Page 221, *supra*.

(b) See 1 Mylne & Keen, 653, 660.

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Green v. Jackson.

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This case is distinguishable from those in which the decision in favor of the residuary legatee rested on the ground that the real estate was converted out and out as from the moment of the testator's death, and therefore applicable as personal estate to every purpose specified in the will. The doctrine of conversion out and out is not very intelligible in itself, and is certainly repugnant to the acknowledged rule of law that the rights of a testator's heir shall not be defeated by anything short of a manifest and declared intent. If that rule be rigidly applied, [\*240] it would necessarily follow that the heir is entitled \*not only to such real estate as has not in express terms been devised away from him to other objects, but also, by way of resulting trust, to such real estate as by the failure of those objects in consequence of lapse or the Mortmain Act is not eventually required for effecting the purposes of the will. To give to a mere general residuary bequest, which might, as against next of kin, carry the lapsed personal estate, the same effect, through the doctrine of conversion out and out, as against real estate or its produce, to the exclusion of the heir at law, is contrary to principle and analogy; and although the doctrine derives some countenance from the earlier cases of *Mallabar v. Mallabar*(a) and *Durour v. Motteux*,(b) and one or two others which like *Kennell v. Abbott*(c) proceeded upon *Durour v. Motteux*, the whole current of modern authorities has run the other way, and has tended to restore the sounder doctrine that the conversion, though complete in altering the quality of the property, is altogether inoperative in affecting the rights of the heir, to whom the converted real estate, not being expressly disposed of, is held to revert, but to revert in the character of personalty. That doctrine is distinctly laid down by Sir W. Grant in *Gibbs v. Rumsey*,(d) and it was lately adhered to in *Amphlett v. Parke*,(e) after much consideration, by Lord Brougham, who, in a very elaborate judgment, in which he overruled the decision of the late Master of the Rolls, took a review of all the leading authorities on the sub-

(a) Ca. T. T. 78.

(d) 2 Ves. &amp; B. 294.

(b) 1 Ves. sen. 320.

(e) Page 221, *supra*.

(c) 4 Ves. 802.

Green v. Jackson.

ject, and particularly *Mallabar v. Mallabar* and *Durour v. Motteux*, and came to the conclusion that those two cases had been misconceived, and that they did not, when closely examined, bear out the general proposition \*they had long [\*241] been supposed to establish. In *Amphlett v. Parke* a petition of appeal was afterwards presented to the House of Lords, in compliance with a suggestion of Lord Brougham himself; but that appeal was ultimately abandoned, so that his Lordship's judgment stands unimpeached, and must now be considered as a binding authority. That the decision in *Amphlett v. Parke* has a direct and powerful bearing on the present case, is manifest from the fact that Lord Brougham declined to decide the latter till the expected judgment of the court of last resort had been pronounced in *Amphlett v. Parke*. The frame of the will there, indeed, was much stronger in favor of the residuary legatee than in the case with which the court has now to deal; for the proceeds of the testator's real and personal estate were thrown into a common fund, and blended in such a way that except in imagination it was impossible to sever them. The judgment of Lord Brougham is supported by the authority of *Cruse v. Barley*,(a) *Arnold v. Chapman*,(b) *Attorney-General v. Johnstone*,(c) *Gravenor v. Hallum*,(d) *Collins v. Wakeman*,(e) and *Jones v. Mitchell*;(g) and it is strictly in accordance with the principles laid down by Mr. Justice Buller in *Hutcheson v. Hammond*,(h) by the late Master of the Rolls in *Jessopp v. Watson*,(i) and by Sir W. Grant in *Gibbs v. Rumsey*,(k) a case which it is impossible to distinguish from the one before the court. *Durour v. Motteux* therefore may now be considered as overruled; or if not directly overruled, as no longer in authority, except in cases where the language of the instrument is identically the same.

\*It is unnecessary, however, to rest this appeal upon [\*242] the authority of *Amphlett v. Parke* as overruling *Durour*

(a) 3 P. Wms. 20.

(b) 1 Ves. sen. 108.

(c) Amb. 577.

(d) Amb. 643.

(e) Ves. jun. 683.

(g) 1 S. & Stu. 290.

(h) 3 Bro. C. C. 128.

(i) 1 Mylne & Keen. 665.

(k) 2 V. & B. 294.



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Green v. Jackson.

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*v. Motteux*; for not only is the language by which the supposed conversion is effected infinitely less strong here than in either of those cases; but there is also a peculiarity here which is not to be found in them; the alleged residuary bequest is the gift only of a special, and not of a general residue. In this view it is that such of the appellants as are the testator's next of kin contend they are entitled to the produce of the leasehold estates ineffectually given to charitable uses. The bequest is, of "all the residue of the moneys which shall then be in their hands, after full satisfaction and discharge of the aforesaid several payments and bequests," among the children of the testator's nephews and nieces. The children of the nephews and nieces are only to take the clear surplus after all those specified purposes have been fully satisfied. This, then, is the gift of a residue with an exception; and the excepted part not being otherwise disposed of, goes, so far as it consists of real estate, to the heir, and so far as it consists of personal estate, to the next of kin. *Davers v. Dewes*,<sup>(a)</sup> *Attorney-General v. Johnstone*,<sup>(b)</sup> *Skrymsher v. Northcote*,<sup>(c)</sup> *Page v. Leap- ingwell*,<sup>(d)</sup> *Baker v. Hall*,<sup>(e)</sup>

Sir *W. Horne* and Mr. *Rudall*, for the residuary legatees, contended that the Lord Chancellor's judgment in *Amphlett v. Parke*, was not inconsistent with that of the late Master of the Rolls in the case under appeal; nor had it been so considered by Lord Brougham; but they submitted, that even if such inconsistency existed, still *Amphlett v. Parke* could hardly be consid-  
 [\*243] ered \*as of great authority, inasmuch as the heir at law, rather than have the judgment carried to the House of Lords, had been glad to effect a compromise of his claims on very reasonable terms. The Lord Chancellor's judgment, besides, was directly opposed, not only to *Mallabar v. Mallabar* and *Durour v. Motteux*, but to a series of subsequent decisions which were supposed to have settled the law upon the subject. *Ogle*

(a) 3 P. Wms. 40.

(d) 18 Ves. 463.

(b) Amb. 577.

(e) 12 Ves. 497.

(c) 1 Swans. 566.

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Green v. Jackson.

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v. *Cook*, (a) *Keannell v. Abbott*, (b) *Noel v. Lord Henley*, (c) That the late Master of the Rolls had not been satisfied with the final determination in *Amphlett v. Parke*, was clear from the language of his judgment in *Phillips v. Phillips*, (d) The argument, that the residuary bequest was not a general, but a special one, was founded entirely in mistake. There could be no such thing as a residue of a residue. A residuary bequest, of necessity, carried everything not effectually given to other objects, provided the lapsed fund were personal in its nature, or what was substantially the same thing, and was the case in the present instance, had the character of personalty irrevocably impressed on it by the language of the testator himself. The cases cited in support of the position, that there might be a special residue, turned upon the very peculiar wording of the wills in those cases; the gift, though in form apparently residuary, would be found on examination to be really specific. But the court had always been reluctant to admit an exception to the general rule; *Cambridge v. Rous*, (e) *Bland v. Lamb*; (g) and here the residuary clause furnished no ground for it whatever; for that merely expressed what every bequest of a residue implied, that what remained, after fully satisfying the purposes previously specified, should be the only fund applicable for the benefit of the residuary legatees.

\*Mr. *Hovenden* and Mr. *J. Russell* appeared for other [\*244] parties.

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1835: *April 1st*.—THE LORD CHANCELLOR (Lord Lyndhurst):—This was an appeal from the judgment of the late Master of the Rolls. Joseph Chapman being possessed of considerable property, both real and personal, by his will directed that his real and personal property should be sold and converted into money, and that the produce should be lodged at interest in one of the banking houses at Hull. He directed certain

(a) 1 Bro. C. C. 513.

(b) 4 Ves. 802.

(c) 7 Price, 242.

(d) 1 Mylne & Keen, 662.

(e) 8 Ves. 12.

(g) 2 J. & W. 399.

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Green v. Jackson.

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legacies to be paid, and, among others, some for charitable purposes, which, as far as they were payable out of real estate, are admitted to be void. The question is, whether that part of the testator's property fell into the residue, or belongs to the heir at law.

The testator, in two several parts of his will, speaking of the mixed fund, calls it the residue of his personalty. He directs his property to be converted into money, which is not to be applied to the ultimate object of the trust until the death of his wife; but is, in the meantime, to remain at interest in the hands of a banker at Hull. Having upon two occasions called the mixed fund "the residue of his personalty," he directs his executors, upon the death of his wife, to pay and apply the residue of the moneys which should be in their hands after satisfying the previous dispositions contained in his will, unto and among the persons whom he proceeds to mention as his residuary legatees.

Taking the whole will together, I am clearly of opinion [\*245] that the testator intended to treat the mixed \*fund, composed of the produce of his real and personal estate, as personalty. I agree entirely with the late Master of the Rolls, in thinking that the case of *Durour v. Motteux* is directly in point with the present case; and as Lord Hardwicke's decision in *Durour v. Motteux* has never been overruled, but on the contrary, has, in more than one instance, been recognized, I feel myself bound to act upon the authority of that case. It was said that *Durour v. Motteux* was overruled by the decision pronounced by Lord Brougham in *Amphlett v. Parke*; but I have seen an accurate note of his judgment in *Amphlett v. Parke*, and it appears to me that Lord Brougham had no intention of overruling *Durour v. Motteux* by his decision in that case. On the contrary, he expressly distinguishes *Amphlett v. Parke* from *Durour v. Motteux*, and from the present case of *Green v. Jackson*, which had been decided by the Master of the Rolls before Lord Brougham pronounced the judgment overruling the same judge's decision in *Amphlett v. Parke*.

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Green v. Jackson.

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It was supposed, in the argument of the present case, that Lord Brougham considered the cases of *Amphlett v. Parke* and *Green v. Jackson* to be alike, and that the decision in the one must govern the decision in the other; but when I come to advert to the language used by Lord Brougham in his judgment in *Amphlett v. Parke*, I find, that so far from his having been of that opinion, he appears to have said directly the reverse. Lord Brougham says, "In *Green v. Jackson*, all the property is marked with the most minute and specific enumeration, to be laid out and formed into a particular fund. And how does the testator deal with that fund? It is to be formed at a certain time, under certain circumstances, and vested in the executors for certain purposes. 'And I do direct that my said trustees shall pay and apply all the \*residue of the [\*246] moneys which shall then be in their hands, unto and among all the children'—that is the residuary legatees. His Honor held there on the peculiar language of the instrument and the authority of *Durour v. Motteux*, that there was an express intention to give the whole, from whatever source arising, whether from lapse or otherwise—all the money then in their hands, after particularly describing and specifying how it was to come into their hands, and how and for what purposes they were to keep it—among the children, the residuary legatees. *Green v. Jackson*, therefore, does not appear to be at all in discrepancy with the other cases professing to be founded on *Durour v. Motteux*." It would seem, therefore, that Lord Brougham did not consider that his judgment in *Amphlett v. Parke* overruling the decision of the late Master of the Rolls, was at all at variance with the same judge's decision, in *Green v. Jackson*, or that his own decision upon the appeal from the judgment of the Master of the Rolls in *Green v. Jackson*, would necessarily have been determined, as has been supposed, by the decision of the House of Lords, in *Amphlett v. Parke*, had that case, instead of being compromised, been brought to a hearing.

Without reference, however, to the case of *Amphlett v. Parke*, I am of opinion that the present case falls directly within the

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Fradella v. Weller

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principle upon which Lord Hardwicke decided the case of *Durour v. Mottoux*, and I feel myself bound by the authority of that decision. The judgment of the Master of the Rolls, therefore, must be affirmed.

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[\*247]

\*FRADELLA v. WELLER.

ROLLS.—1831: 31st January.

In a suit to restrain the sale of pirated copies of a print, where the answer did not suggest that the prints complained of were not pirated copies, a decree was made under the particular circumstances, though the prints, which had been exhibited to the witness who proved the offence, were not produced at the hearing.

Where the plaintiff is entitled to have the injunction made perpetual, the defendant will have to pay the costs of the suit, however trivial the subject matter of the suit may be, if he did not, after the injunction was granted, tender the costs up to that time.

In the summer of 1828, the plaintiff, having ascertained that three pirated copies, made in France, of an engraving, of which he had the copyright, had been sold by the defendant, filed his bill and obtained an injunction *ex parte*.

The defendant, by his answer, stated that he bought at a shop in London, which he named, some engravings; that among these were the three engravings complained of, which purported to have been engraved at Paris; that he paid 16s. for them; that, neither when he bought them nor when he sold them, had he any suspicion or notion that they were piracies, and if he had been aware of their being so, he would not have had anything to do with them; that he had not sold any copies of the engraving in question, except these three; and that no notice of any complaint against his conduct was given to him before the filing of the bill.

After the injunction had been obtained, the plaintiff had expressed his willingness to proceed no further in the suit, if the

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*Pradella v. Weller.*

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costs were paid. The defendant, though willing to submit to the injunction, refused to pay the costs; but took no steps to put in his answer till compelled, or to dissolve the injunction, or to dismiss the bill for want of prosecution.

The plaintiff, having proceeded with the suit, obtained a decree *nisi* by default; and the cause now came on to be \*heard on showing cause against making the decree [\*248] absolute.

A witness proved that the defendant had sold three engravings, which were produced to the witness, and were referred to in his deposition as exhibits; and that these three engravings were piracies of a print, also an exhibit, which was the plaintiff's engraving. But all the prints, which had been made exhibits, had been stolen since the former hearing, and none of them were now produced.

Mr. *Pemberton* and Mr. *Keene*, for the plaintiff, were willing to waive the account, but insisted on their right to have a decree with costs against the defendant.

Mr. *Bickersteth* and Mr. *O. Anderdon*, for the defendant.

As the engravings referred to in the depositions are not produced, there is no evidence that the engravings sold by the defendant were piracies of the plaintiff's print. Neither is there any evidence of the title of the plaintiff; for if the engraving, of which he claims the copyright, had been produced, it might have been found that the date of the publication and the name of the proprietors did not appear upon it. Besides, the injury alleged to have been sustained by the plaintiff is so trivial, and the sum in question is so small, that the matter is below the dignity of the court. The only copies of the alleged piracy, which have been sold by the defendant, are the three which the plaintiff's agent purchased; and the whole three were worth only about 16s. At all events, the plaintiff ought to have been satis-

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Fradella v. Weller.

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fied with retaining his injunction undisturbed; and the court ought not to encourage the oppression of bringing such a cause to a hearing.

[\*249]     \*THE MASTER OF THE ROLLS:—The first question is, whether the defendant has been proved to have been guilty of pirating the plaintiff's print. A witness, whose evidence is unopposed, swears that three prints were sold by the defendant, which, on comparison with the original print belonging to the plaintiff, were, he says, clearly pirated. There is no suggestion in the answer that the engravings complained of were not piracies. But, these engravings having been lost or stolen since the examination of the witness, it is said that, when prints are complained of as piracies, it is usual to exhibit to the court the original and the alleged piracy, and, as that has not been done here, there is no means of judging whether the plaintiff's rights have been invaded. And no doubt it is usual to produce the prints, and the court may, on the inspection of them, form its opinion; but it is not necessary to produce them, and the court may decide without inspection. Here it was not made a question in the cause, whether the engravings, of which the bill complained, were piracies of the plaintiff's print; and the testimony of the witness being unopposed, there is sufficient evidence to charge the defendant with the offence.

It is next said, that the injury complained of is of so small an amount, that costs ought not to be awarded to a plaintiff who prosecutes such a suit to a hearing. I admit that it would not have been fit for the plaintiff to have prosecuted this suit, if the defendant had tendered to him the costs occasioned by his wrong doing, and by the steps which that wrong doing had caused the plaintiff to take for his protection. But the defendant did not tender the costs; he must, therefore, be charged with costs; it is not reasonable that a party, whose copyright has been

[\*250]     pirated, should \*sustain the further injury of having to bear the costs of obtaining protection.

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Weall v. Rice.

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Let the injunction be made perpetual; let the plaintiff, if he chooses, have an account; and let the defendant pay the costs of the suit.

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The plaintiff waived the account.

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\*WEALL v. RICE.

[\*251]

ROLLS.—1831: January, 7th and 25th February.

If a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he does not mean a double provision.

But this presumption may be repelled or fortified by intrinsic evidence from the nature of the two provisions, or by extrinsic evidence of the intention of the testator at the time of making his will.

Slight differences between the two provisions will not repel the presumption against double provisions.

Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature.

Declarations of the parent referring to his intention at the time of making his will, whether made at the time or before or after, are admissible evidence to prove that he did not mean to give a double provision.

A paper written some time after the date of his will, and showing the state of his property, but having no reference to his intention, is not admissible for that purpose.

A father, by articles made previous to the marriage of his daughter, agreed to settle, either by deed or will, lands of the value of 3,000*l.*, in trust for his daughter for life, to her separate use, remainder to the husband for life, remainder to the children of the marriage as tenants in common in tail, with cross remainders. By his will he devised a real estate worth more than 3,000*l.*, in trust for his daughter for life to her separate use, but without the power of anticipation or alienation; remainder to the husband for life, he maintaining and educating the children of the marriage; remainder to the children of the marriage as tenants in common in fee; with a limitation over of the shares of those, who should die under twenty-five without leaving issue, to the survivors: Held, that the differences between the two provisions were not such as to repel the presumption against double portions, and that the daughter, her husband and children, were not entitled both to the benefits given by the will and to the provisions stipulated for by the articles.

JOHN WEALL, in contemplation of the intended marriage of his daughter Ann with the defendant Henry Rice, executed



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Weall v. Rice.

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articles of agreement, dated the 4th of September, 1816, which were in the words following :

" Whereas a marriage being about to take place between my daughter Ann Weall, and Mr. Henry Rice of Jermyn street, St. Jame's, it was agreed that I should advance 3,000*l.* as a marriage portion, to be settled on my daughter and Mr. Rice, and their issue ; but being desirous of making a more advantageous arrangement and provision for my daughter and her intended husband and their issue by the said marriage, by settling [\*252] some \*part of my estates in the county of Middlesex, or some other freehold or copyhold estate to be hereafter purchased by me, to the use or in trust for my daughter for life, independent of her husband ; and after her decease, to the use of or in trust for Mr. Rice for life, if he should survive her ; and after the death of both of them, to the use of or in trust for their children, if they shall have any by the said marriage, as tenants in common in tail, with cross remainders in tail ; and on failure of issue by the said marriage, or in case there shall be a child or children by the said marriage, and all and every such child or children shall die under the age of twenty-one years without issue, then to the use of or in trust to return to my own family in such manner as I shall direct : Now, I do hereby agree with Mr. Rice that I will, either by deed or by my last will, settle such a landed estate, part of my present estates, or hereafter to be purchased by me, as shall be of greater value than 3,000*l.*, to the uses and upon the trusts in the manner hereinbefore expressed, with the usual power of leasing ; and in the meantime, and until such estate is settled, I will pay the annual sum of 150*l.* to my said daughter Ann Weall, independent of her husband ; and after her decease, to the person or persons who, for the time, would be entitled to the rents and profits of the estates so agreed to be settled in manner before mentioned, if such settlement had been made.—J. WEALL."

The agreement, as originally drawn, ended with the following clause : " And, inasmuch as I have not yet made my will, in case

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Weall v. Rice.

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I should die before I do make the same, or execute a deed of settlement to the effect hereinbefore mentioned, then it is agreed, that the said sum of 3,000*l.*, or such interest as my said daughter and Mr. Rice, and their issue, would take under and by virtue of this agreement, shall go and be considered as part \*of her share of my personal estate, which she will, in [\*253] the event of my dying intestate, be entitled to, as one of my children, and shall be taken into the account of my personal estate accordingly." But these words were erased; the initials of Mr. Weall were written in the margin over against the erasure; and on the document there was a memorandum signed by him, which stated that the erasure was made before he signed the agreement.

The marriage was solemnised.

John Weall, by his last will, dated the 21st of March, 1818, and duly executed and attested, gave and devised, amongst other things, as follows; "Also I give, devise, limit and appoint all that my farm, consisting of a large barn, and divers closes, fields, or parcels of meadow land, containing by estimation forty-five acres, be the same more or less, partly freehold and partly copyhold, situate, lying and being in the several parishes of Kingsbury and Harrow, or one of them, in the said county of Middlesex, purchased by me of my brother Benjamin, as the same now are in the occupation of John Field, with the appurtenances, to, for, and upon the uses, trusts, intents, and purposes following; that is to say, to the use of my said sons, John Weall and Benjamin Weall, their heirs and assigns, for and during the natural life of my daughter Ann, wife of Henry Rice of Jermyn street, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed; and, upon further trust, from time to time during the natural life of my said daughter Ann, to pay unto or authorize and permit her to receive the rents and profits of the said farm and lands last above devised, when, and as the same become due and payable from time to time during \*the natural life of my said [\*254]

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daughter, to and for her own use and benefit, separate and apart from and exclusive of her present or any future husband with whom she may intermarry, and so that the same may not be under his power or control, or subject or liable to his debts, contracts, forfeitures, or engagements, so that the receipts of my said daughter Ann alone, notwithstanding her present or any future coverture, and whether she shall be married or sole, shall be sufficient discharges for the said rents and profits, and so and in such manner that she, my said daughter Ann, may not sell, charge, alien, assign, incumber, or otherwise anticipate all or any part of the same rents and profits, before the same shall become due and payable; and from and after her decease, then to the use of the said Henry Rice, the husband of my said daughter Ann Rice, in case he shall survive her for and during the term of his natural life, he nevertheless maintaining and educating her said child and children; and from and after the decease of my said daughter Ann Rice and her said husband, to the use of all and every the child and children of my said daughter Ann Rice, by the said Henry Rice lawfully begotten and to be begotten, to be equally divided between them, if more than one, share and share alike as tenants in common, and not as joint tenants, and his, her and their respective heirs and assigns forever: and in case any one or more of such children shall die under the age of twenty-five years without leaving any issue of his, her or their body or respective bodies lawfully begotten, living at the time of his death or respective deaths, then as, to, for and concerning the original share or shares of and in the said farm, lands and hereditaments last above devised, which shall belong to the child or children respectively dying as aforesaid, and also the share or several shares of and in the [\*255] same farm lands and hereditaments which such \*child or children respectively shall take under this provision by way of cross limitations, to the use of the survivor or survivors, other and others of the same children, to be equally divided among them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and his, her and their respective heirs and assigns for ever; and in case no child of my

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said daughter Ann Rice shall live to attain the age of twenty-five years, or die under that age leaving such issue as aforesaid, then to the use of such of my children Thomas, John, Benjamin, and Elizabeth Weall, brothers and sisters of Ann Rice, as shall be living at the time of her decease, and the lawful issue of such, if any, of them, the said Thomas, John, Benjamin, and Elizabeth Weall, as shall be then dead leaving issue then living, to be equally divided among them, if more than one, share and share alike as tenants in common, and his, her and their respective heirs for ever; so, nevertheless, that the issue of a deceased brother or sister of the said Ann Rice take only the share which his, her or their parent would have taken, if living: *Provided always*, and I hereby declare, that it shall and may be lawful to and for my said daughter Ann Rice during her life, notwithstanding her present or any future coverture, and whether sole or married, and after her decease, to and for her said husband Henry Rice, in case he shall survive her, and after the decease of the survivor of them, to and for the trustees or trustee for the time being acting under this my will, during the minority of any person or persons for the time being seised or entitled to any farm, lands, and hereditaments last above devised, from time to time, by indentures or indenture duly executed by her, him or them, to demise and lease all or any part or parts of the same farm, lands and hereditaments to any person or persons for any term or number of years not exceeding fourteen years, to take effect in \*possession and not in reversion, or by [\*256] way of future interest, so as upon every such demise or lease there be reserved or made payable, to be incident to the immediate reversion of the premises so to be demised, the best or most improved yearly rent or rents that can at the time be reasonably had or obtained for the same; without taking any fine or premium or other matter for the making thereof, and so as there be contained in every such lease a proviso or condition for re-entry for nonpayment of the rent thereby reserved, by the space of twenty-eight days next after the same shall have become due and payable, and so as the person or persons, to whom any such demise or lease shall be granted, do execute a counterpart

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or counterparts thereof, and thereby covenant for the due payment of such rent or rents, and be not by any words or clause to be contained in such lease rendered dispunishable for waste, and so as the copyhold parts of the same farm, lands and hereditaments be demised according to the custom of the manor whereof the same are parcel: *Provided also*, and I hereby further declare that after the decease of my said daughter Ann and her said husband, in case he should survive her, thenceforth during the minority of each or any of her children by the said Henry Rice, the trustee or trustees, for the time being acting under this my will, shall and may enter on, hold and enjoy the part of the same child of and in the same farm, lands and hereditaments last above devised, and receive and take the rents and profits thereof, and apply and dispose of such profits in the same manner as the interest or yearly proceeds of such child's share of and in the sum of 2,500*l.* hereinafter bequeathed, and the stocks, funds and securities, in or upon which the same shall be laid out and invested, is or are hereinafter directed to be applied during his or her minority. Also I direct my executors hereinafter named, within six calendar months next after [\*257] \*my decease, to lay out the sum of 2,500*l.* sterling in the purchase of a competent share of the 5*l.* per cent. bank annuities, or of some other of the parliamentary stocks or funds of Great Britain, or at interest upon government or real securities in England, as they shall think fit, to be transferred unto them, or into their joint names, upon the trusts hereinafter expressed or declared of and concerning the same (that is to say), upon trust, from time to time during the natural life of my said daughter Ann Rice, to pay unto and authorize, permit and suffer her to receive and take the interest, dividends or yearly proceeds thereof, when and as the same shall become due or payable from time to time, to and for her own use and benefit, separate and apart from, and exclusive of her present or any future husband with whom she may intermarry, and so and in such manner, and under the same or the like restrictions as hereinbefore expressed, concerning her life interest in the rents and profits of the farm and lands last above devised under the trusts above declared

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in that behalf; and from and after the decease of my said daughter Ann Rice, in case she shall leave any child or children her surviving, then upon trust from time to time during the life of the said Henry Rice her husband, in case he shall survive her, or for so long time as the said child or children of my said daughter Ann Rice shall live, but no longer, and until the said child or children shall severally and respectively attain the age of twenty-five years, to pay unto and authorize, permit and suffer him to receive and take the interest, dividends or yearly proceeds of the stocks, funds or securities to be purchased with the said sum of 2,500*l.*, to and for his own use and benefit, he, nevertheless, maintaining and educating the child or children of my said daughter Ann Rice; and from and after the decease of the said Henry Rice, in case he shall survive my said daughter \*Ann Rice, and any such child or children [\*258] shall also survive her, or upon her child or children severally and respectively attaining the age of twenty-five years, which shall first happen, then, as to, for and concerning the said sum of 2,500*l.*, and the stocks, funds and securities to be purchased therewith, upon trust for all and every the child or children of my said daughter Ann Rice, lawfully begotten and to be begotten, to be equally divided between them, if more than one, share and share alike, such share and shares to be paid and transferred to him, her or them severally and respectively as when he, she and they shall severally and respectively attain the age of twenty-five years; and in case any one or more of them shall happen to die under the age of twenty-five years without leaving lawful issue of his, her or their body or respective bodies, living at the time of his, her or their death or respective deaths, then as to the original share or shares of and in the said sum of 2,500*l.*, and the stocks, funds or securities to be purchased therewith, which shall belong to the child or children respectively so dying, and also as to the share or shares of and in the same money, stocks, funds or securities which shall from time to time be taken by such child or children under this present limitation, by way or in the nature of cross remainders, in trust for the survivors and survivor, other and others of the same children

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respectively, to be equally divided between them, if more than one; and in case no child of my said daughter Ann Rice shall survive her, or, surviving her, shall live to attain the age of twenty-five years, or die under that age leaving such issue as aforesaid, then, as to, for and concerning the said sum of 2,500*l.*, and the stocks, funds and securities in or upon which the same shall be laid out and invested, upon trust for such of my other children, Thomas, John, Benjamin, and Elizabeth,

Weall, as, shall be living at the decease of my said  
[\*259] \*daughter Ann Rice, and the lawful issue of such, if any,

of the same children as shall be then dead leaving issue then living, equally to be divided between them, if more than one, share and share alike, so nevertheless that such issue take only the share which his, her or their parent would have taken if living; and it is my will and meaning, and I do hereby direct that my said trustees and executors, in the mean time, from and after the decease of my said daughter Ann Rice, and of her said husband, in case he shall survive her, and thenceforth during the minority of her children, do apply all or any part of the dividends, interest or yearly proceeds arising from the share of each of the children, of and in the trust money, stocks, funds or securities hereby settled on him or her, in or towards his or her maintenance and education; and further, that so much, if any, of the same dividends, interest or yearly proceeds as shall not be applied for those purposes, shall from time to time be added to the principal money of the same share, and improved at interest, together with the same and as a part thereof, by way or in the nature of compound interest, and follow and be subject to all the limitations, trusts and dispositions herein expressed, declared and contained concerning the principal of such share, until the same shall become payable or transferable: and I further direct and declare, that it shall and may be lawful to and for the trustees or trustee, for the time being acting under this my will, after the decease of my said daughter Ann Rice, and her said husband, in case he shall survive her, and also in their or either of their lifetime, with their consent and approbation, or the consent and approbation of the survivor, in writing, to

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advance to or for any child or children of my said daughter any part, not exceeding one half, of the value of the expectant or presumptive share of each of such children respectively, of and in the said trust money, stock, funds, and securities, in \*part of the share or shares of the same child respect- [\*260] ively." The testator gave 6,500*l.* for the benefit of his daughter Elizabeth: he bequeathed the residue of his personal estate to his children Thomas Weall, John Weall, Benjamin Weall, Elizabeth Weall and Ann Rice, in equal shares: and he devised the residue of his real estate to his sons John and Benjamin, and appointed them his executors.

The testator paid 150*l.* a year to Mr. and Mrs. Rice during his life, and died in October, 1822, without having made any settlement on them in pursuance of the articles of the 4th of September, 1816.

After the testator's death, there were found among his papers two memorandums in his own handwriting. One of them began with the following words: "This is the way I intend to leave my property and estates to my children as below stated, and have given instructions to Mr. Palmer of Rickmansworth this day, the 11th of March, 1818, to make my will as here below stated by me John Weall senior, of Hatch End in the hamlet of Pinner, Middlesex. My will is made by Mr. Palmer, and signed the 21st of March 1818, by me John Weall senior, and property left as below stated. To my son Thomas Weall in money, 6,000*l.*, to be paid in twelve calendar months. To my son John Weall the land at and in Oxey Lane" (here came an enumeration of parcels); "on the whole, I think and am sure, not worth less than . . . . . £2,800 0 0

Twenty-one acres meadows at Norrid, not worth less, I am sure, than . . . . . 1,200 0 0

Money to be paid in twelve calendar months . . . . .	1,000 0 0
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	£5,000 0 0"
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[\*261] \*In another part of this memorandum were the following words: "To Ann Rice the estate at Kingsbury, not worth less, I am sure, than 4000*l.*: money for her to be put in the stocks by the executors and trustees, 2,500*l.*; 6,500*l.* for my daughter Ann Rice."

The other paper began as follows: "The account below is what I think and am sure is owing to me from my sons Thomas, John and Benjamin Weall, and owing me from other people, and what I have by me in money and stock; what I have here stated is what I am worth besides estates. May 5th, 1821." Then followed a statement of the debts due to him, and of his other property, exclusive of his real estates.

Henry Rice, for himself and his family, having claimed to be entitled as well to the provisions made by the settlement as to the provisions made by the will; the bill was filed by John Weall, Benjamin Weall and Thomas Weall, for the purpose of having it declared that Mr. Rice and his wife and children were bound to elect between the provisions made for them by the will and those of the settlement.

Henry Rice, by his answer, alleged that the testator, before signing the agreement of the 4th of September, 1816, stated that the 3,000*l.*, mentioned in it as his daughter's portion, was an equivalent for the sums which he already had given to his sons for their advancement; that he should provide for all his children alike; and that, at his death, the remainder of his property should be divided equally among them. Both he and his wife insisted that they and their children were entitled to the benefits given them by the will, as well as to the provisions secured to them by the agreement.

[\*262] \*Mr. Tinney and Mr. Barber, for the plaintiffs;

Mr. Bickersteth and Mr. Stuart, for Mr. and Mrs. Rice;

Mr. Pemberton and Mr. Norton, for the children of Mrs. Rice.

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The two memorandums in the testator's handwriting, which are before stated to have been found among his papers, were tendered in evidence by the plaintiffs, in order to show that the testator did not intend that Mrs. Rice and her family should have any share of his property, except that which was given to them by the will.

The defendants objected to the admission of these documents as evidence, on the ground that the question must be decided on the construction of the articles of agreement and of the will, as collected from the instruments themselves, and could not be affected by any declarations of the testator, whether made by parol or contained in written memorandums, to which neither the will nor the articles had any reference. Part of the first paper purported to have been written before the will was executed; another part of it appeared to have been written after the will, but how long after, it was impossible to conjecture. The second paper had no reference to the will, and was of a date long posterior to it. Neither of the documents was contemporaneous with the will.

On the other hand, the plaintiffs contended that the declarations of a parent, referring to his intention at the time of making his will, were admissible in evidence to prove that he did not intend to give double portions; and that they were equally admissible for that purpose, \*at whatever time [\*263] they were made. They cited *Hinchcliffe, v. Hinchcliffe*, (a) *Pole v. Lord Somers*, (b) *Druce v. Denison*. (c)

THE MASTER OF THE ROLLS admitted the first paper; stating that he considered it to be settled by the cases of *Hinchcliffe v. Hinchcliffe* and *Pole v. Lord Somers*, that declarations of the parent, referring to his intention at the time of making his will, whether made at the time, or before, or after, were admissible evidence to prove that he did not mean to give a double pro-

(a) 3 Ves. Jun. 516.

(b) 6 Ves. 309.

(c) 6 Ves. 385.

vision. But he rejected the second paper, upon the ground that it had no reference to the intention of the testator.

On the principal question the following authorities were cited in the course of the argument: *Jesson v. Jesson*,<sup>(a)</sup> *Thomas v. Kemey*s,<sup>(b)</sup> *Bruen v. Bruen*,<sup>(c)</sup> *Moulson v. Moulson*,<sup>(d)</sup> *Copley v. Copley*,<sup>(e)</sup> *Blandy v. Widmore*,<sup>(g)</sup> *Lee v. D'Aranda*,<sup>(h)</sup> *Warren v. Warren*,<sup>(i)</sup> *Byde v. Byde*,<sup>(k)</sup> *Sparkes v. Cator*,<sup>(l)</sup> *Pole v. Lord Somers*,<sup>(m)</sup> *Hinchcliffe v. Hinchcliffe*,<sup>(n)</sup> *Alleyn v. Alleyn*,<sup>(o)</sup> *Mathews v. Mathews*,<sup>(p)</sup> *Haynes v. Mico*,<sup>(q)</sup> *Jeacock v. Falkener*,<sup>(r)</sup> *Oliver v. Brickland*,<sup>(s)</sup> *Barret v. Beckford*,<sup>(t)</sup> *Devese v. Pontet*,<sup>(u)</sup> *Jones v. Martin*,<sup>(v)</sup> \**Ellison v. Cookson*,<sup>(w)</sup> *Randall v. Willis*,<sup>(x)</sup> *Lewis v. Madocks*,<sup>(y)</sup> *Baugh v. Read*,<sup>(z)</sup> *Forsight v. Grant*,<sup>(a)</sup> *Finch v. Finch*,<sup>(b)</sup> *Richardson v. Elphinstone*,<sup>(c)</sup> *Couch v. Stratton*,<sup>(d)</sup> *Tolson v. Collins*,<sup>(e)</sup> *Freemantle v. Bankes*,<sup>(g)</sup> *Twisden v. Twisden*,<sup>(h)</sup> *Robinson v. Whitley*,<sup>(i)</sup> *Garthshore v. Chalie*,<sup>(k)</sup> *Wallace v. Pomfret*,<sup>(l)</sup> *Bengough v. Walker*,<sup>(m)</sup> *Curzon v. De la Zouch*,<sup>(n)</sup> *Goldsmid v. Goldsmid*,<sup>(o)</sup> *Thellusson v. Woodford*,<sup>(p)</sup> *Wathen v. Smith*,<sup>(q)</sup> *Bell v. Coleman*.<sup>(r)</sup>

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| (a) 2 Vern. 255.                         | (w) 1 Ves. jun. 100; 3 Bro. C. C. 61; 2 Cox, 220. |
| (b) 2 Vern. 348; 2 Freem. 207.           | (x) 5 Ves. 262.                                   |
| (c) 2 Vern. 439; Prec. in Chan. 195.     | (y) 8 Ves. 150; 17 Ves. 42.                       |
| (d) 1 Bro. C. C. 82.                     | (z) 1 Ves. jun. 267.                              |
| (e) 1 P. Wms. 147.                       | (a) 1 Ves. jun. 298.                              |
| (g) 2 Vern. 709; 1 P. Wms. 324.          | (b) 1 Ves. jun. 534.                              |
| (h) 1 Ves. sen. 1; 3 Atk. 419.           | (c) 2 Ves. jun. 463.                              |
| (i) 1 Bro. C. C. 305; 1 Cox, 41.         | (d) 4 Ves. 391.                                   |
| (k) 1 Bro. C. C. 308, nota.              | (e) 4 Ves. 483.                                   |
| (l) 3 Ves. jun. 530.                     | (g) 5 Ves. 79.                                    |
| (m) 6 Ves. 309.                          | (h) 9 Ves. 413.                                   |
| (n) 3 Ves. jun. 516.                     | (i) 9 Ves. 577.                                   |
| (o) 2 Ves. sen. 37.                      | (k) 10 Ves. 1.                                    |
| (p) 2 Ves. sen. 635.                     | (l) 11 Ves. 542.                                  |
| (q) 1 Bro. C. C. 129.                    | (m) 15 Ves. 507.                                  |
| (r) 1 Bro. C. C. 295.                    | (n) 1 Swans. 185.                                 |
| (s) Cited in 3 Atk. 420.                 | (o) 1 Swans. 211.                                 |
| (t) 1 Ves. sen. 519.                     | (p) 4 Madd. 420.                                  |
| (u) Prec. in Chan. 240, note 1 Cox, 288. | (q) 4 Madd. 325.                                  |
| (v) 3 Anst. 882.                         | (r) 5 Madd. 22.                                   |

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It was contended on the part of the plaintiffs, that the case came within that class of authorities which has established, that a testamentary gift made by a father to a child is to be considered as a satisfaction of any portion which the father had agreed to provide for the child, and that slight differences between the two provisions will not prevent the one from being regarded as a satisfaction of the other. Here the interest secured to Mrs. Rice, by the articles of agreement, was an estate for life to her separate use; the interest given to her by the will was also an estate for life to her separate use; and the only circumstance of difference was, that the will restricted her from anticipation or alienation. The lands at Kingsbury were alone of sufficient value to be a satisfaction of the agreement; and in them the husband took an estate for life in remainder after his wife's death, \*which was all that he was entitled to [\*265] under the articles. It was true that the will annexed to the gift the obligation of maintaining and educating the children; but that was an obligation which the law itself would have imposed upon him, and the discharge of it was in furtherance of the principal object with which marriage settlements and articles for settlements are made. As to the children, the only difference between the two provisions was, that under the articles the children were to take as tenants in common in tail with cross remainders; but under the will, they took the Kingsbury property as tenants in common in fee, and they took the 2,500*l.* absolutely, either at the death of the survivor of the mother and father, or on their attaining twenty-five after the death of their mother and in their father's lifetime.

If these slight differences were sufficient to induce the court to doubt whether the bequests given by the will were a satisfaction of the bequests stipulated for by the articles, yet, in cases of alleged double portions, the question is always one of intention; and the point to be ascertained is, did the testator intend that his daughter and her family should take both provisions; or did he intend the devise and bequest to them, contained in his will, to be a substitution for what they might have claimed under the

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articles? If the latter was his intention, the objects of his testamentary bounty will not be permitted to defeat it, by taking what he meant them to have and also what he did not mean them to have. The will itself showed that the testator did not contemplate that Mrs. Rice and her family were to take more of his property than he had devised and bequeathed to them; and the memorandum of March, 1818, put an end to any possible doubt on the point.

[\*266] \*On the other hand, it was contended for the defendants, that the provisions made by the will for Mr. and Mrs. Rice and their children neither constituted a satisfaction of the articles nor raised a case of election. The articles created an obligation which bound the assets of the testator; and the first question was, had that obligation been satisfied? Clearly not. Mrs. Rice was entitled to claim an estate for her life to her separate use, unincumbered by any restrictions: and that claim could not be satisfied by giving her an estate for life, so qualified that she could neither anticipate nor alien it—so modified as to deprive her of the ordinary advantages attending the possession of property. The estate, which Mr. Rice took under the will, was clogged with a condition which amounted to a trust in favor of his children, and which would entitle them, if he did not maintain and educate them in a manner suited to their situation and prospects in life, to file a bill against him, and to call upon the court to compel the application of a sufficient part of the income given to him by the will towards the discharge of that obligation which the will had annexed to the gift. Each child of the marriage was entitled under the articles to an interest, by way of cross remainders, in the shares of the other children: under the will they took only their respective shares. In no case had a gift by will been held to be a satisfaction for a portion, where the differences between the two provisions were so numerous and so important as they were here.

If the doctrine of satisfaction did not apply, still less could a question of election be raised. Why were the parties to lose the

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benefit of the contract into which the testator had entered, because he had made them also objects of voluntary bounty? There was no condition annexed to his testamentary gifts; he had nowhere \*said that Mr. and Mrs. Rice and [\*267] their children should take what he gave them by his will in lieu of what he had contracted to secure to them; nor was there any part of the will from which an implication to that effect could be fairly raised. Even the memorandum of March, 1818, amounted to nothing but an estimate of the pecuniary value of the benefits which each of his children was to take under the will; and there was no part of it from which it could be inferred, that the testator intended his daughter, her husband, and her children, to relinquish their claim under the articles. In truth, the circumstances of the case precluded election. It would be for the interest of Mr. Rice to take the provision stipulated for by the articles, rather than that made for him by the will; the interest of his wife and children would be the other way: what then would be to be done, if he were to elect to take against the will, while she and the children elected to take under it?

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*Feb. 25th.*—THE MASTER OF THE ROLLS:—In the argument of this case, I believe every authority has been cited which can bear upon the question. I do not think necessary to advert to them particularly; but I shall endeavor to state distinctly the principles which I extract from the cases, and upon which my judgment proceeds.

The rule of the court is, as, in reason, I think it ought to be, that if a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he does not mean a double provision; but this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two \*provisions, or by extrinsic evidence. [\*268] Where the two provisions are of the same nature, or

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there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favor of a double provision. But in either case extrinsic evidence is admissible of the real intention of the testator. It is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature; and every judge must decide that question for himself.

In the present case, the two provisions appear to me substantially of the same nature: and I consider that, the wife taking in both instruments to her separate use, it is but a slight difference that in the will she is restrained from anticipation and alienation—that, the husband, taking in both instruments an estate for life in remainder, it is but a slight difference that in the will it is expressed that he is to maintain and educate his children—that it is but a slight difference that by the settlement the children take as tenants in common in tail with cross remainders, and that by the will they take as tenants in common in fee, and that the testator has expressed an intention to give them cross remainders by a void executory devise, if any of them die under twenty-five. These differences, as I have before observed, appear to me to leave the two provisions substantially of the same nature. My opinion, therefore, is, that, if in this case there were no extrinsic evidence, Mr. Rice and his family could not claim the double provisions.

But in this case there appears to me to be extrinsic evidence, which is conclusive upon the question, that, at the making \*of the will, the testator did not intend a double [\*269] provision. Upon referring to the paper written by him as instructions for his will, it is apparent that he means to dispose of his whole property, and as between his two daughters, he gives the same bounty; and it must be inferred, that when he says that he gives to Mrs. Rice an estate "not worth less, he

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is sure, than 4,000*l.*," he has expressly in view the articles by which he had bound himself to provide for her and her family an estate of greater value than 3,000*l.* His plain, apparent intention, therefore, at the time of making his will, would be wholly defeated, if the double provision were to take effect; and upon this paper alone, the claim of Mr. Rice and his family would fail.

It is argued, that the children of the marriage are not bound by the same principles. There is no ground for this distinction: the intention of the testator, which governs this case, applies to the whole family. All must elect between the two provisions.

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**\*PHILLIPS GRANT BOOKER, CATHERINE BOOKER, MARY [\*270]  
ARTIMISIA BOOKER, AND ELIZA JANE BOOKER, INFANTS, BY GEORGE BARKER, THEIR NEXT FRIEND, *versus* JOHN HENSLEIGH ALLEN, JOHN PHILLIPS ADAMS, CHARLES RANKEN, WILLIAM EVANS, LUKE BOOKER, HENRY GWYTHYR AND MARIA PHILLIPA HIS WIFE, MARIA PHILLIPA GWYTHYR, THE YOUNGER, JAMES HENRY ALEXANDER GWYTHYR, AND SIR RICHARD PHILLIPS BULKELEY PHILLIPS, BARONET.**

**ROLLS.**—1831: 14th January, 7th and 28th February.

A testator, who has contributed to the maintenance and education of a female infant nearly related to him, from the time of her father's death, and who has been treated by her as the person whose consent was necessary to her marriage, and who has taken upon himself the obligation to make a provision for her in that event, is, as to the question of a double provision by will and settlement, to be considered in *loco parentis*; and the presumption against a double provision, which would arise in the case of a father, will apply to such a case.

In such a case, parol evidence may be adduced to prove the intention against a double provision, as well as on the question whether the testator was in *loco parentis*.

**Quære,** Whether, if the testator was not to be considered in *loco parentis*, parol evidence of his intention not to make a double provision by will and settlement would be admissible?



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It being proved by parol evidence that the testator intended the provision made by the settlement to be in lieu of a legacy given by the will, the settlement was held to be a satisfaction of the legacy, though the two provisions differed so much from each other that they could not be considered substantially the same.

The legacy was not set up by a codicil, made after the first settlement, ratifying and confirming the will and all the devises and bequests therein contained.

MISS GRANT was one of the nearest relations of the late Lord Milford, being descended from a brother of his grandfather; and her brother, the defendant, Sir Richard Phillips, was the devisee of his large estates. The father of Miss Grant died, [\*271] leaving \*his family wholly unprovided for; and after his death, Miss Grant resided until her marriage, not with her mother, who survived the father, but with one of her aunts. During the life of her grandfather, she was maintained and educated at the joint expense of her grandfather and Lord Milford; and, the grandfather also having died in her infancy, and left her one third of his residuary estate, which amounted to about 1,500*l.*, Lord Milford from that time made her an annual allowance, by which and the income of the 1,500*l.*, but with some encroachment also on the principal, she was maintained and educated. Her aunt from time to time consulted Lord Milford as to the plan of her education; and Miss Grant was occasionally a visitor at Lord Milford's house.

In October, 1818, Dr. Booker made an offer of marriage to Miss Grant by a letter, which Miss Grant transmitted to Lord Milford, enclosed in a letter from herself, requesting his Lordship's approbation of the proposal. In answer to this application, Lord Milford referred her to his solicitor, Mr. Ranken; and on the 29th of October, he wrote a letter to Mr. Ranken, enclosing hers, in which he said, "I have referred her to you for my sentiments on this business; and I trust you will not flatter her with any hope of my consent to her union with Dr. Booker, until it can be found that he has an equivalent to settle upon her." On the 31st of October, 1818, Mr. Ranken wrote to Miss Grant, informing her that, before Lord Milford would give his consent to the match, a settlement must be made by Dr. Booker at least

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equal to what would be made on her part, and that he was not authorized by his Lordship to name any particular sum. Notwithstanding this, the marriage took place on the 3d of November, following, without the previous knowledge or approbation of Lord Milford.

\*Between the 19th of November and the 1st of December, 1818, several interviews took place between Dr. Booker and Mr. Ranken; when it appeared that Dr. Booker had not any property which he could make the subject of a settlement: but he offered to insure his life for 2,000*l.*, and to settle the policy, together with 1,000*l.* which remained of the fortune Mrs. Booker took under the grandfather's will, on her and the issue of her marriage. These circumstances being communicated to Lord Milford, a letter, dated the 5th of December, and written on his Lordship's behalf by his secretary, was sent to Mr. Ranken, which contained the following passage: "In respect to Mrs. Booker's settlement, it is his intention at his decease to leave her 4,000*l.*, and to allow her 100*l.* per annum, to be paid half-yearly; the first payment to be made July 1st, 1819." After the lapse of some time, Dr. Booker having effected an insurance on his life for 2,000*l.* with the view of making it the subject of settlement, he and his wife were anxious that Lord Milford should be a party to the proposed deed, and should covenant for the payment of the 4,000*l.*, and the annuity of 100*l.* a year; and this request Mr. Ranken communicated to Lord Milford. His Lordship was at first averse to complying with the application, and stated that he thought Dr. Booker and Mrs. Booker ought to be satisfied with his assurance that he would make by his will the provision he had promised them; but he afterwards consented to be a party to the settlement, and to covenant for the payment of 4,000*l.* at his decease. [\*272]

Accordingly, an indenture of settlement, bearing date the 21st of June, 1820, was on that day made and executed between and by Luke Booker and Elizabeth his wife of the first part, Richard Lord Milford of the second part, and Charles Ranken

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[\*273] and William Evans of \*the third part; whereby—  
after reciting that a marriage had been solemnized between Luke Booker and Elizabeth Grant, and that previously to, and at the time of, the solemnization of the marriage, Elizabeth Booker was possessed of 1,000*l.* bank 3 per cent. consolidated annuities, which, upon the treaty for the marriage, it was agreed should be transferred to Ranken and Evans upon the trusts thereafter set forth; and that it was also agreed that Luke Booker should, after the solemnization of the marriage, cause an insurance to be effected on his life in the sum of 2,000*l.* and should assign the policy, with the moneys thereby secured, to Ranken and Evans upon the trusts thereafter declared; and further reciting, that the 1,000*l.*, three per cent. consolidated annuities had, since the solemnization of the marriage, been duly transferred to Ranken and Evans, and that Luke Booker had effected the insurance—it was witnessed, that, in pursuance of the said agreement, and in consideration of the marriage, and in order to make a provision for Elizabeth Booker in the event of her surviving her husband, and for the issue of the marriage, Ranken and Evans, their executors, administrators, and assigns, should thenceforth stand possessed of the 1,000*l.* three per cent. consolidated annuities, so transferred to them, upon trust that they should permit and suffer Luke Booker and his assigns to receive and take the interest, dividends and annual produce thereof during his life, and from and immediately after his decease, upon trust that they should permit and suffer Elizabeth Booker and her assigns to receive the dividends and annual produce of the said 1,000*l.* three per cent. annuities; and from and immediately after the decease of the survivor of them, Luke Booker and Elizabeth his wife, then that Ranken and Evans, their executors, administrators, and assigns, should  
[\*274] stand possessed of the 1,000*l.* three per cent. consolidated annuities, and the interest, dividends and annual produce thereof, in trust for the child or children of the marriage, in the manner therein mentioned; that is to say, in case there should be but one such child, in trust for such only child, and to become and be an interest vested in such child, and to be paid,

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transferred and assigned to him or her, at or on such age, day or time as Luke Booker and Elizabeth his wife, at any time or times during their joint natural lives, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be sealed, delivered and attested as therein mentioned, should jointly direct or appoint; and for want of such joint direction or appointment, then as the survivor of them, Luke Booker and Elizabeth his wife, at any time after the decease of such of them as should first depart this life, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be sealed, delivered and attested as therein mentioned, or by his or her last will and testament in writing, should alone direct or appoint; and for want of and until any such direction or appointment as thereinbefore mentioned, in trust for all and every the children of Luke Booker on the body of Elizabeth Booker lawfully begotten or to be begotten, equally to be divided among them, share and share alike, the share or shares of such of them as should be a son or sons to be an interest or interests vested in him or them respectively at his or their age or respective ages of twenty-one years; and the share or shares of such of them as should be a daughter or daughters to be an interest or interests vested in her or them respectively, at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which should first happen, and to be paid, assigned and transferred to them respectively, at or \*on the same ages, days or times, if the same should [\*275] respectively happen after the decease of the survivor of them, Luke Booker and Elizabeth his wife; but if the same should happen in the lifetime of Luke Booker and Elizabeth his wife, or the survivor of them, then immediately after the decease of such survivor: And it was thereby declared, that in case any appointment should be made in pursuance of any of the powers aforesaid, which should extend only to a part or parts of the trust premises, and the residue thereof should not be so appointed as aforesaid, such partial appointment should be valid and effectual, notwithstanding the non-appointment of the remaining part or parts thereof: but in that case, any child or children, entitled

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to a share or shares under such appointment or appointments, should not (unless such appointment or appointments should express an intention to the contrary) be entitled to any further share or shares of or in the remaining or unappointed part or parts of the trust premises, without bringing such his, her or their appointed share or respective shares into hotchpot, and accounting for the same accordingly: And it was declared, that if any one or more of the said children of Luke Booker and Elizabeth his wife should depart this life before he, she or they should respectively have attained a vested interest in his, her or their share or respective shares of the trust premises by virtue of the trusts aforesaid, or any appointment to be made in pursuance of any of the powers thereinbefore contained, and there should not be any such direction or appointment as aforesaid, contrary to the tenor and effect of the present proviso, then, as well the original share or shares of him, her or them so dying, as the share or shares which should have survived or accrued to him, her or them respectively, by virtue of this proviso, of and in the said bank annuities, and the interest, dividends [\*276] \*and annual produce thereof, or so much thereof as should not have been applied for his, her or their maintenance or advancement, in pursuance of the powers thereafter contained for those purposes, should from time to time, go and accrue to the survivor or survivors of the said children, and the executors, administrators or assigns of such of them (if any) as should be then dead, having first acquired a vested interest or interests in his, her or their original share or shares, and should be equally divided between or amongst such survivor or survivors, and the representatives of such of them (if any) as should be then so dead, share and share alike, such representatives taking only the share and shares which such deceased child or children would have taken, if living; and all such surviving or accruing share or shares should become vested in and be payable or transferable to the person or persons who should become entitled to the same respectively as aforesaid, at such ages, days and times as were thereby provided and declared touching or concerning his, her or their original share or shares, or as near

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thereto as the death of the parties would admit of: but in case there should be no child of Luke Booker on the body of the said Elizabeth his wife to be begotten, or in case there should be any such child or children, and none of them should live to attain a vested interest in the trust premises, the said Ranken and Evans, and the survivor of them, and the executors, administrators and assigns of such survivor, from and immediately after the decease of Luke Booker and Elizabeth his wife, and such failure of their children as aforesaid, were to stand possessed of the said 1000*l.* bank annuities, and the interest, dividends and annual produce thereof, or so much thereof as should not have been applied for maintenance or advancement, and as should not have become vested in any such child or children, in trust

\*for such person or persons, in such parts, &c., as the [\*277] said Elizabeth Booker, by any deed or deeds, instrument or instruments in writing, &c., or by her last will, &c., should, notwithstanding her then present or any future coverture, direct, limit or appoint; and in default of such last-mentioned direction, limitations or appointment, and as to so much of the trust premises to which no such direction, limitation or appointment should extend, in trust for such person or persons as should at the decease of the said Elizabeth Booker, be her next of kin by blood, and would, under the statutes made for distribution of intestates' effects, be entitled to her personal estate, in case she had died a widow and intestate. The next proviso declared, that in case there should be any child or children of Luke Booker on the body of Elizabeth his wife to be begotten, living at the time of the decease of the survivor of them, Luke Booker and Elizabeth his wife, whose share or respective shares of and in the said trust premises should not then have become vested, and there should not be any such direction or appointment as aforesaid to the contrary, it should be lawful for Ranken and Evans, or the survivor of them, or the executors, administrators or assigns of such survivor, from and after the decease of the survivor of them, Luke Booker and Elizabeth his wife, to pay and apply the income or annual produce of the expectant or apparent share or respective shares for the time being of such child or children of and in

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the said trust premises, or so much thereof as they, Ranken and Evans, or the survivor of them, or the executors, administrators or assigns of such survivor, should, in their or his discretion, think proper, for or towards the support, maintenance and education of such child or children respectively, until such his, her or their share or respective shares should become vested, or he, she or they respectively should previously die; and if [\*278] in \*any one year the trustees or trustee for the time being should not pay or apply for the maintenance, support and education of any one or more of the said children the whole of the income or annual produce of the said expectant or apparent share, for the time being, of such child or children respectively, then that so much of such income or annual produce as should not have been so applied as aforesaid, should accumulate and go in augmentation of, and be paid, assigned and transferred at the same time and together with the original share or shares of such child or children respectively, and be subject to such benefit of survivorship or accruer, and other limitations, as were therein before contained respecting such original share or shares; yet so, nevertheless, that it should be lawful for the said trustees or trustee for the time being, to apply the surplus and savings of the income of the share or shares of every or any such child, in any one or more preceding year or years, for and towards and in increase of his or her maintenance in any succeeding year or years. It was also declared, that it should be lawful to and for Ranken and Evans, or the survivor of them, or the executors, administrators or assigns of such survivor, at any time or times during the lifetime of Luke Booker and Elizabeth his wife, or the survivor of them, with the consent in writing of them or the survivor of them, and after the decease of such survivor, at the discretion of the said trustees or trustee for the time being, in case there should not be any such direction or appointment as aforesaid, contrary to the tenor and effect of the present proviso, to sell, assign and transfer any part, not exceeding one moiety, of the appointed expectant or apparent share or shares, for the time being, of such of the said children of the said marriage as should be a son or sons, of or in the said trust pre-

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mises, and to apply the moneys to be produced by every [\*279] such sale or transfer \*in the placing or putting him or them, whose share or shares should be so in part sold or transferred, in or to any business, profession or employment, or in the purchasing of any commission or commissions in the army or otherwise, for his or their respective preferment or advancement in the world, notwithstanding his or their share or respective shares of and in the said trust premises, should not then have become vested or payable or transferable as aforesaid." Clauses followed, giving powers to sell the 1,000*l.* stock, to lay it out on other securities, to vary those securities from time to time, and to lay out the money in the purchase of freehold or copyhold lands. The policy of assurance, too, was assigned Ranken and Evans, who were to stand possessed of all sums of money which should be received in respect of it, and the securities in which they might be invested, on the same trusts and subject to the same provisos and powers as were expressed concerning the 1,000*l.* stock: and Dr Booker covenanted to keep the policy on foot at his own costs.

The indenture then recited that, upon the treaty for the marriage, it was agreed that Lord Milford should enter into a covenant for payment of the sum of 4,000*l.* within six calendar months next after his decease, to trustees for the benefit of Luke Booker and Elizabeth his wife and their children, and with such limitations over as were thereinbefore mentioned: and accordingly Lord Milford for himself, his heirs, executors, and administrators, covenanted with Ranken and Evans, their executors, administrators, and assigns, that the heirs, executors or administrators of him Lord Milford would, within six calendar months next after his decease, pay or cause to be paid unto Ranken and Evans, or the survivor of them, or the executors, administrators or assigns of such survivor, or the trustee or trustees for \*the [\*280] time being acting in the execution of the said indenture, the principal sum of 4,000*l.* but without any interest for the same; And it was declared that Ranken and Evans, their executors, administrators or assigns, or others the trustee or trustees for



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the time being, should stand possessed of and interested in the said principal sum of 4,000*l.* upon trust that they should lay out and invest the same in or upon the public stocks or funds of Great Britain, or upon government or real securities in England or Wales, and should from time to time sell, transfer, alter, vary, and transpose the same stocks, funds or securities in, to or for others of the same or a similar nature as to them or him should seem expedient; yet so that no such investments, sale, alterations, or transpositions, should be made during the lifetime of the said Luke Booker, and Elizabeth his wife, or the survivor of them, without their or his consent or approbation in writing; and that the said trustee or trustees for the time being should stand and be possessed of and interested in the last mentioned stocks, funds and securities, and the interest, dividends and annual produce thereof, upon and for the same trusts, intents and purposes, and with, under and subject to the same powers, provisos, declarations and restrictions, as were thereinbefore expressed, declared and contained of and concerning the said sum of 1000*l.* Bank three per cent. consolidated annuities, and the interest, dividends and annual produce thereof, or such and so many of them as should be then subsisting undetermined or capable of taking effect.

After the marriage of Dr. Booker and Elizabeth Grant, but before the execution of the settlement, Lord Milford had made his will, dated on the 21st of January, 1820, which was partly in the following words:

[\*281]     \*“I give and bequeath unto my friends, James Ackland, of Amroth House in the said county of Pembroke, Esq., and John Hensleigh Allen, of Cressley in the same county, Esq., their executors and administrators, the sum of 4,000*l.* upon the trusts, and for the ends, intents, and purposes, and with, under and subject to the provisions and declarations hereinafter expressed and declared, of and concerning the same (that is to say), upon trust, that they the said James Ackland and John Hensleigh Allen, or the survivor of them, or the executors and

administrators of such survivor, do and shall, immediately after my decease, lay out and invest the same sum of 4,000*l.* in their or his names or name, in the purchase of some of the parliamentary stocks or public funds of Great Britain, being of a permanent nature and not of a limited period, or at interest upon real securities in England or Wales, and also do and shall from time to time alter, vary and transpose, all or any of such stocks, funds, or securities as they or he shall think fit; with powers for the said trustee or trustees, for the aforesaid purposes or any of them, to give complete acquittances and discharges in writing, to any person or persons paying, or discharging or purchasing any of the aforesaid trust moneys, stocks, funds, and securities; and upon further trust, that they the said James Ackland and John Hensleigh Allen, or the survivor of them, or the executors or administrators of such survivor, do and shall, during the life of my relative Elizabeth Booker, the wife of the Rev. Luke Booker, Doctor of Divinity, Rector of Dudley in the county of Worcester, and the daughter of my kinswoman Maria Phillipa Gwyther, wife of the Rev. Henry Gwyther, curate of Westbury in the county of Wilts, by her first husband, John Grant, Esq., deceased, pay the interest, dividends and annual produce of the said stocks, funds, and securities, unto such person or persons, \*and for such intents and purposes as the said [\*282] Elizabeth Booker, by any writing to be signed with her own hand, shall notwithstanding her present or any future coverture, from time to time direct or appoint; and until and in default of any such direction or appointment, into her own proper hands for her own sole and separate benefit, independently of, and free from the debts, control, or interference of the said Luke Booker, or any future husband with whom she may intermarry: and I will and declare that the receipts of the said Elizabeth Booker, or of such other person or persons as she shall or may from time to time direct or appoint as aforesaid, shall, notwithstanding her present or any future coverture, and whether she be covert or sole, be good and effectual releases and discharges for the same, or so much thereof as in such receipts shall be expressed to have been received; and from and immediately after

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the decease of the said Elizabeth Booker, upon trust, that they the said trustee or trustees do and shall pay and transfer the said principal money, stocks, funds, and securities, unto all and every the child or children of the body of the said Elizabeth Booker lawfully begotten or to be begotten, equally to be divided between or amongst them, share and share alike, if there shall be more than one, and if there shall be but one such child, the whole to be paid or transferred to such child or children at the times or time and in manner following (that is to say), the share or shares of such of them as shall be a son or sons to become vested in him or them respectively on his or their attaining the age of twenty-one years, and to be paid or transferred to him or them on his or her attaining that age, if the same should happen after the decease of the said Elizabeth Booker, but if in her lifetime, then to be paid to him or them immediately after her death,

and the share or shares of such of the said child or child-  
[\*283] ren as shall be a \*daughter or daughters to become vested in her or them respectively, when she or they shall respectively attain the age of twenty-one years or be married, which shall first happen, and to be paid or transferred to her or them respectively, when she or they respectively shall attain the same age or be married, if the same shall happen after the decease of the said Elizabeth Booker, but if in her lifetime, then immediately upon her death: provided always, and I do hereby declare my will to be, that if one or more of such child or children shall depart this life, before he, she or they shall attain a vested interest in the said trust moneys, stocks, funds, or securities by virtue of this my will, then the share or shares of him, her and them so dying, shall go and accrue to the survivor or survivors, or other or others of such children, and be equally divided amongst them, if more than one, share and share alike, as the same shall become vested, payable, and transferable, at the same days and times as are hereinbefore mentioned with respect to his, her and their original share or shares of the said trust moneys, stocks, funds, or securities; and in case of the death of any other of such children, before such accruing or surviving share or shares shall become vested as aforesaid, then

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every such accruing and surviving part or share shall be again subject and liable to such right, chance, contingency, or condition of accruer, to and amongst the survivor or survivors and other or others of the said children as hereinbefore is provided touching the same original share or shares thereof: and upon further trust that any such trustee or trustees do and shall after the decease of the said Elizabeth Booker pay and apply the dividends and interest of the share or shares of such of the said children as shall not have acquired a vested interest in the said trust moneys, stocks, funds, or securities, for and towards his, her or their maintenance and education respectively, until the same respectively shall become \*payable: and [\*284] in case there shall be no child of the body of the said Elizabeth Booker lawfully begotten, or, there being one or more such child or children, all of them shall happen to die without having attained a vested interest or vested interests in the said trust moneys, stocks, funds, and securities, under the trust aforesaid, then and in such case it is my will that they the said James Ackland and John Hensleigh Allen or the survivor of them, or the executors or administrators of such survivor do and shall, immediately after the decease of the survivor of the said Elizabeth Booker and such child or children, pay the interest, dividends and annual produce of the said trust moneys, stocks, funds, and securities, unto the said Maria Phillipa Gwyther and her assigns for and during her life, for her and their own use and benefit; and from and immediately after the decease of the said Maria Phillipa Gwyther, to Maria Phillipa, the daughter of the said Maria Phillipa Gwyther by the said Henry Gwyther, until she shall attain the age of twenty-one years, or be married, and when she shall attain that age or be married, do and shall pay and transfer the whole of the said trust moneys, stocks, funds and securities, unto the said Maria Phillipa Gwyther, her executors, administrators and assigns, for her own absolute use and benefit: but in case the said Maria Phillipa Gwyther shall attain the age of twenty-one years or be married, then my will is that the whole of the said principal moneys, stocks, funds, and securities, shall go to my executors hereinafter named upon the

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like trusts, and for the like ends, intents and purposes, as are hereinafter declared with respect to the residue of my personal estate." He appointed James Ackland and John Hensleigh Allen his executors.

In September, 1820, Lord Milford made a codicil to his will, giving a small annuity; and in October, 1820, another [\*285] \*codicil, giving another small annuity. James Ackland having died, his Lordship made a third codicil, dated the 28th of July, 1821. After mentioning the death of Ackland, and expressing his desire to appoint John Phillips Adams a trustee and executor in his stead, and to give another legacy in addition to those given by his will, he, by this codicil, which he directed to be taken as part of his will, appointed John Phillips Adams to be a trustee in conjunction with Hensleigh; and, for further effectuating his said desire, he "gave, devised and bequeathed unto the said John Phillips Adams and John Hensleigh Allen, their heirs, executors, administrators, and assigns respectively, all and singular so much and such part of his real and personal estate as were by his said will given, devised and bequeathed unto the said James Ackland and John Hensleigh Allen, their heirs, executors, administrators, and assigns respectively, to have, hold, receive, and take the same unto and by the said John Phillips Adams and John Hensleigh Allen, their heirs, executors, administrators, and assigns respectively, for and during the like estates and interests, in the like manner, to, upon and for the like uses, trusts, interests, and purposes, and with, under and subject to the like powers, provisos, conditions, declarations, and agreements as were in and by his said will given, devised, bequeathed, limited, directed, expressed, declared, and contained of and concerning the same parts of his said real and personal estates so thereby given, devised and bequeathed unto the said James Ackland and John Hensleigh Allen, their heirs, executors, administrators, and assigns respectively as aforesaid." The testator then gave, devised and bequeathed unto the said John Phillips Adams the sum of 100*l.*, to be paid to him immediately after his decease, and nominated, constituted and

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appointed the said John Phillips Adams and \*John [\*286] Hensleigh Allen executors of his said will, and of that his said codicil, upon the trust aforesaid : and he thereby "ratified and confirmed his said will, and all devises and bequests, matters and things therein mentioned and contained, and not thereby and therein revoked, altered or varied."

Lord Milford, on the 14th of October, 1822, made a fourth codicil, bequeathing three small legacies.

Lord Milford died on the 28th of November, 1823 ; Mrs. Booker died in January, 1826, leaving her husband and four infant children her surviving.

The bill was filed by the children of Dr. and Mrs. Booker for the purpose of asserting their title to the benefits given them by Lord Milford's will, in addition to the provisions made for them by his covenant in the settlement. The bill charged that it was the meaning and intention of Lord Milford that both the sum of 4,000*l.* covenanted by the settlement to be paid, and also the sum of 4,000*l.* bequeathed by his will, should, upon his decease become payable for the benefit of Elizabeth Booker and her issue ; that Elizabeth Booker was his near kinswoman and relative ; that Lord Milford was a single man, and never had any family of his own ; that he had adopted, brought up, and educated Elizabeth Booker from her infancy at his own expense ; that he always acted towards her as a parent, and on all occasions expressed himself as being much attached to her, and anxious for her advancement and welfare in the world ; and that, from the time of the marriage down to his death, his Lordship had paid to Dr. Booker, by way of bounty, and in order to assist in the support of his wife and family, an annual allowance of 200*l.* The prayer was, that it might be declared that the personal \*estate and effects of Lord Milford [\*287] were liable to the payment of the principal sum of 4,000*l.* covenanted by the indenture of settlement to be paid by him, with interest from the end of six months after his decease,

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and also to the payment of the legacy of 4,000*l.*, with interest, to be computed from the end of twelve months after his decease.

Sir Richard Phillips Bulkeley Phillips, the residuary legatee of Lord Milford, and brother of Mrs. Booker, by his answer admitted that Lord Milford had contributed to her maintenance and education in the manner already mentioned; that he had shown her the regard usual among relations; and that she had been an occasional visitor at his house. He then said, "that it was not true that Lord Milford did adopt, bring up, and educate Elizabeth Booker from her infancy at his own expense, or otherwise than as aforesaid; or that Lord Milford did stand towards Elizabeth Booker in the place and situation of a father, or that he professed and expressed or showed in any manner, further or otherwise than as aforesaid, great interest or regard for her or for her advancement and welfare in the world."

According to the evidence, Lord Milford had contributed regularly to the maintenance and education of Mrs. Booker before her marriage, and was consulted as to the mode of bringing her up; and she was frequently at his house as a visitor. About the time when she came of age, a proposal of marriage was made to her by a Mr. Unthank, and upon that occasion she applied to Lord Milford for his consent to the match. Lord Milford approving of the marriage, authorised his solicitor to communicate to the father of the intended husband, that the provision, which he meant to make for Miss Grant, was the sum of [\*288] 4,000*l.* to be paid at his \*death. Accordingly the father of the intended husband, who was a solicitor, prepared a draft of a settlement; by which the sum of 4,000*l.* was to be settled on Miss Grant and the intended husband and their issue. This draft was submitted to Lord Milford's solicitor for his perusal, and, being approved by him, was afterwards engrossed; but, finally, the marriage with Mr. Unthank did not take effect.

In 1815, another offer of marriage was made to Miss Grant, on which Lord Milford was consulted; and communications

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took place between him and the intended husband as to the amount of the provision which he meant to make for the lady ; but this negotiation, also, was ultimately broken off.

Mr. Ranken, in his deposition, after proving the circumstances connected with the proposal of marriage on the part of Dr. Booker, stated, that, "about the time when Richard Lord Milford did so consent to concur in such settlement, he expressly informed deponent, and desired deponent to inform the defendants, Luke Booker and Elizabeth, his wife, that he had done so on the recommendation of the deponent for their satisfaction; and that the provision, which he had agreed to make by such settlement, was in lieu of the provision which he had promised and agreed to make by his will for the said Elizabeth Booker; and that he, deponent, did so expressly inform the defendants, Luke Booker and Elizabeth Booker, accordingly.

Mr. *Pemberton* and Mr. *Wheatley*, for the plaintiffs.

The presumption against double provisions coming from a parent to a child, is founded on the principle that it is the intention of the parent, in making the provision, to satisfy \*the moral obligation he is under: but a stranger or [\*289] collateral relation not being under any such obligation, his gifts are mere bounty; there is no measure by which that bounty can be limited, except the language of the instruments by which it takes effect; and a legacy given by his will would not be deemed to be satisfied by a settlement subsequently made, even if the two provisions were the same, or so similar as not to be substantially different. *Shudal v. Jekyll*, (a) *Powell v. Cleaver*, (b) *Brown v. Peck*. (c) In the present case the two provisions are essentially different. Under the will, Dr. Booker takes nothing, and Mrs. Booker takes an immediate estate for life to her separate use; the settlement gives Dr. Booker a life interest, and gives Mrs. Booker nothing till after his death; under the will,

(a) 2 Atk. 516.

(b) 2 Bro. C. C. 499.

(c) 1 Eln. 140.



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the children, on the death of their mother, become entitled to the 4,000*l.*, in equal shares; under the settlement, their interests are postponed till the death of their father, and are subject to a power of appointment. Even, therefore, if the provision had come from a parent, it would be impossible to contend that the settlement was either a satisfaction or an ademption of the legacy.

The parol evidence that the testator intended the settlement to be a satisfaction of the legacy, cannot be received; for though such evidence has been received to support the presumption against double portions, it cannot be admitted where the presumption does not exist. If it be said that Lord Milford is proved to have placed himself in *loco parentis*, and that parol evidence of his intention is therefore admissible, we deny that parol evidence can be received for the purpose of letting in other parol evidence. The testimony, which is tendered here, [\*290] \*is in contradiction to the tenor of the instruments themselves, and to the answer of the principal defendant, who denies that Lord Milford did place himself in the situation of a parent towards Miss Grant.

If the settlement were, in itself, a satisfaction or ademption of the legacy given by the prior will, the third codicil will prevent that consequence from ensuing. The codicil republishes the will; it makes the will speak from that date; and it expressly ratifies and confirms all the bequests contained in the will. In fact, therefore, Lord Milford has, by a testamentary instrument, long after the date of the settlement and of his alleged communication to Mr. Ranken, bequeathed to the infant plaintiffs the legacies which they now claim: and it must have been the intention of Lord Milford that Mrs. Booker and her children should take the legacy as well as the provision secured for them by his covenant: *Jackson v. Hurlock*,<sup>(a)</sup> *Robinson v. Whitley*,<sup>(b)</sup> *Hurst v. Beach*.<sup>(c)</sup>

(a) 2 Eden, 263.

(c) 5 Madd. 351.

(b) 9 Ves. 577.

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Mr. *Tinney* and Mr. *Harwood*, for Dr. *Booker*, supported the argument of the plaintiffs, and cited *Debeze v. Mann*,<sup>(a)</sup> *Roome v. Roome*,<sup>(b)</sup> *Dundas v. Dutens*,<sup>(c)</sup> and *Hartopp v. Hartopp*.<sup>(d)</sup>

Mr. *Bickersteth*, for the residuary legatee, first insisted that Lord *Milford* was to be considered as having placed himself in *loco parentis* towards Miss *Grant*, so that the case was to be governed by the same rules which applied to parent and child.

\*Mr. *Pemberton* objected, that it was not open to the [\*292] defendant to allege that Lord *Milford* had placed himself in *loco parentis* towards the lady, or to tender evidence on that point, even if such evidence were admissible, because, by his answer he had alleged the contrary; and the passage of the answer, already referred to, was read in support of the objection.

Mr. *Bickersteth* answered, that the bill alleged that Lord *Milford* had placed himself in the relation of a parent towards the lady, and that the plaintiffs could not now be allowed to controvert their own allegation. The passage of the answer, which had been referred to, amounted to no more than this, that Lord *Milford* had not placed himself in the situation of a parent further or otherwise than as appeared by the acts and conduct therein mentioned; but these acts and conduct sufficiently established, that for the purposes of the present question, he was to be considered in *loco parentis*.

THE MASTER OF THE ROLLS expressed his opinion, that the answer was to be taken as meaning no more than that Lord *Milford* did not place himself in the situation of a father otherwise or further than as the inference that he did so might arise from the facts admitted by the defendant.

Mr. *Bickersteth* and Mr. *Pole* continued their argument for the residuary legatee.

(a) 2 Bro. C. C. 519.

(b) 3 &tk. 181.

(c) 1 Ves. jun. 196; 2 Cox. 235.

(d) 17 Ves. 134.

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The relationship between Miss Grant and Lord Milford, his pecuniary contributions towards her maintenance and education, and the interest he took in all her concerns, place him towards her in the relation of a parent. Whenever any treaty of marriage was in agitation, he was the first person consulted; [\*292] it was with \*him that the husband and the husband's relations communicated on the subject of the portion he meant to give the lady; and it never for one moment occurred to him to suggest that she was not to derive a portion from him. These are matters which must necessarily be established by parol evidence; and they are completely established here. Lord Milford voluntarily took upon himself obligations which law or nature did not impose upon him; and he is entitled to the benefit of all the presumptions which would exist between a parent and a child. The consequence is, that evidence may be received that a provision made by him on the marriage of the lady was a satisfaction of a legacy given her by his will: *Ex parte Pye*,<sup>(a)</sup> *Monck v. Monck*,<sup>(b)</sup> *Rosewell v. Bennet*,<sup>(c)</sup> *Hartopp v. Hartopp*.<sup>(d)</sup> In *Shudal v. Jekyll*,<sup>(e)</sup> parol evidence was received of the testator's declarations. The evidence here shows, beyond all doubt, that Lord Milford did not mean to make two provisions for his relation and her family; and, on the contrary, that the covenant was entered into at their request, and upon their importunity, and was a substitution for the legacy.

If the legacy given by the will is to be considered as satisfied by the provision made by the settlement, it is in substance adeemed: it ceases to be an operative part of the will, and the subsequent codicil cannot operate as a new gift: *Izard v. Hurst*,<sup>(g)</sup> *Drinkwater v. Falconer*,<sup>(h)</sup> *Crosbie v. M'Doual*.<sup>(i)</sup> In *Monck v. Monck*, a legacy given by a person standing in *loco parentis*, was adeemed or satisfied by a provision made for him on his marriage; and a subsequent codicil, by which the testator

(a) 18 Ves. 140.

(b) 1 Ball &amp; Ba. 298.

(c) 3 Atk. 77.

(d) 17 Ves. 184.

(e) 2 Atk. 516.

(g) 2 Freem. 224; 2 Eq. Ca. Ab. 769.

(h) 2 Ves. sen. 623.

(i) 3 Ves. 610.

[\*293] \*"ratified and confirmed his will in all respects," was held not sufficient to set up the bequest.

Mr. Pemberton in reply.

In *Hurst v. Beach*, the language of the court was this: "Where the court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed. In like manner, evidence is received to repel the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him; and to repel the presumption that a portion is satisfied by a legacy. In all these cases the evidence is received in support of the apparent effect of the instrument, and not against it. I am of opinion, therefore, that such evidence cannot be received without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument."<sup>(a)</sup> Here the parol evidence is tendered to counteract what would be the effect of the will and settlement, if these two instruments were construed without reference to anything not contained in them.

In *Ex parte Pye*, Lord Eldon, speaking of the doctrine, that a legacy might be satisfied by a portion, says,<sup>(b)</sup> "The court seems, in the older cases, to have met with some difficulty in determining whether this rule should be confined to those who stood in the actual relation of parent and child; and it has accordingly been urged in argument, but not supported by decision, except where, accounted for by evidence of declarations, that the court \*have said they did not mean to confine this [\*294] doctrine to persons standing in that actual relation; but perhaps it might apply to a person placing himself in *loco parentis*, undertaking the care of an orphan: but what is to be the evidence of that, whether written evidence in the will and

(a) 5 Madd. 360.

(b) 18 Ves. 151.

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settlement, or the conduct observed at the marriage, or to be derived from mere declarations, is left so much afloat, that there is considerable difficulty in making a judicial decision upon it." The evidence which is here offered to prove that Lord Milford placed himself in *loco parentis*, does not come within even any of the classes to which Lord Eldon refers in language implying anything rather than a sanction of their admissibility.

Lord Hardwicke, in *Shudal v. Jekyll*, has stated what circumstances must concur to bring bounty proceeding from a collateral relation within the rule against double portions. "This court," says his Lordship,<sup>(a)</sup> "leans strongly against double portions or double provisions; and whether the portion given in the lifetime is less or not, is no ways material: but all these cases differ extremely from a bounty given by a remote relation; though I will not say but there may be cases between collateral relations which would be considered as an ademption; for, suppose a child to be an orphan, without father or mother, under the care of a collateral relation, who by his will gives her a legacy, and expresses it to be for her portion, and afterwards make a provision for her in his lifetime, I should be inclined to think this an ademption. But in the present case, the plaintiff's father is living; and a collateral relation only, her great uncle, gives her a general legacy. Now, I do not know any case where such a relation's giving a general legacy, and afterwards [\*295] \*advancing the same person in his lifetime, has been held to be a satisfaction, and therefore differs from the cases of fathers or grandfathers standing in *loco parentis*." Thus, before a testator can be considered as placing himself in *loco parentis*, the object of his bounty must be an orphan, without father or mother; secondly, he must have taken the individual under his care; and thirdly, the legacy must be expressed by the will to be by way of portion. In *Monck v. Monck*,<sup>(b)</sup> every one of these three circumstances existed.

(a) 2 Atk. 518.

(b) 1 Ball & Bo. 298.

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Supposing it to be established or assumed that Lord Milford was in *loco parentis* towards the lady, there is neither principle nor authority for receiving his communications made either directly or indirectly to Mr. Ranken, as evidence to vary the rights of Mrs. Booker's children under the will and the settlement.

Even between parent and child, an advancement or settlement upon marriage cannot be considered an ademption or satisfaction of a legacy, unless the two gifts be substantially the same; they must be to the same individuals, for the same purposes, and with limitations or modifications not essentially different. Here the two gifts are totally dissimilar. How could an interest limited to Mrs. Booker after the death of her husband be a satisfaction of the immediate life interest which the will gave her to her separate use? The fund comprised in the settlement may be appointed to one of the children; how could the benefits taken by that one child be a satisfaction and ademption of the vested and indefeasible interests which each of the other children, upon attaining twenty-one, took in their respective shares of the money given by the will, unless it is to be held that a legacy given to one person may be satisfied by a \*provision [\*296] made for another? If the legacy is to be considered as satisfied, it must be satisfied in  *toto* : then supposing all the children to die under twenty-one, what becomes of the interest of Mrs. Gwyther and her daughter under the ultimate limitation over? Their rights cannot be adceded by a settlement in which their names are not mentioned; and if the legacy is to exist for one purpose, it must remain a valid bequest for all.

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*February 28th.*—THE MASTER OF THE ROLLS:—On the 3d of November, 1818, a marriage was had between Dr. Booker, one of the defendants, and Miss Elizabeth Grant, his late wife. Miss Grant was a cousin and one of the nearest relations of the late Lord Milford, who died unmarried and without issue; and her brother, the defendant Sir Richard Phillips, was the devisee of

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his great estates. The father of Miss Grant died, leaving his family wholly unprovided for. Miss Grant's mother survived the father; but after the death of the father Miss Grant resided, not with her mother, but with one of her aunts until her marriage; and, during the life of her grandfather, she was maintained and educated at the joint expense of her grandfather and Lord Milford. The grandfather also died in her infancy and left her one third of his residuary estate, which amounted to the sum of 1,500*l.*, and after the death of the grandfather, Lord Milford made her an annual allowance, by which and the income of the 1,500*l.* she was maintained and educated. Her aunts from time to time consulted Lord Milford as to the plan of her education, and Miss Grant occasionally visited Lord Milford. About the time of her coming of age, a proposal of marriage was made to her by a Mr. Unthank: and upon that occasion Miss Grant applied to Lord Milford for his consent to the marriage.

[\*297] Lord Milford, \*approving of the marriage, authorized his solicitor to communicate to the father of the intended husband, that the provision, which he meant to make for Miss Grant, was the sum of 4,000*l.* to be paid at his death; and a draft of a settlement was in consequence prepared by the father of the intended husband, who was a solicitor, and was submitted to Lord Milford's solicitor for his perusal. Being approved by him, it was afterwards engrossed; and by it the sum of 4,000*l.* was to be settled on Miss Grant and the intended husband and their issue; but the marriage with Mr. Unthank did not take effect.

The offer of marriage, made by Mr. Booker to Miss Grant, was by a letter, which Miss Grant enclosed to Lord Milford, requesting his approbation; and in answer to such letter Lord Milford desired his solicitor to communicate to Miss Grant, that before he would give his consent, he must require from Dr. Booker a settlement on his part equal to what might be made on the part of Miss Grant. The solicitor of Lord Milford had afterwards several interviews with Dr. Booker, when it appeared

that all that Dr. Booker could do was to insure his life for a sum of 2,000*l.*, and to settle on Miss Grant and her issue the policy of assurance, and 1,000*l.* which then remained to her of her fortune under the will of her grandfather; and at the time, Lord Milford's solicitor, at Lord Milford's desire, communicated to Dr. Booker that it was his intention at his decease to leave Miss Grant 4,000*l.*, and to give her an annuity of 100*l.* per annum during her life. Miss Grant afterwards married Dr. Booker, without any settlement being made. But, after the marriage, the solicitor of Lord Milford, at the request of Dr. and Mrs. Booker, applied to Lord Milford to make the settlement which he had proposed; and thereupon Lord Milford stated, that he thought the parties ought to be satisfied with his assurance that he would make his will as he had \*promised [\*298] to do. Subsequently, however, Lord Milford, at the request of his solicitor, consented to execute a deed for the payment of the 4,000*l.* at his death, but expressly desired his solicitor to inform Dr. and Mrs. Booker that he consented to do so upon the recommendation of his solicitor and for the satisfaction of Dr. and Mrs. Booker, and that the provision, which he agreed to make by such settlement, was in lieu of the provision which he had promised and agreed to make for Mrs. Booker by his will. Thereupon the indenture of settlement, bearing date the 21st of June, 1820, was executed.

Lord Milford had previously, namely, on or about the 21st of January, 1820, made his will of that date, whereby he gave a sum of 4,000*l.* upon trust, to pay the dividends to Mrs. Booker for life to her separate use; and after her death, for the children of the marriage in equal shares; the shares to vest in sons at twenty-one, and in daughters at twenty-one, or marriage; with a limitation over, if there was no child of the marriage who attained a vested interest, to the mother of Mrs. Booker during her life, and after her death, to Mrs. Booker's sister of the half blood. After the settlement, Lord Milford published four codicils to his will; and by the 3d of these, which bore date on the 28th



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of July, 1821, he ratified and confirmed his will and all the devises and bequests therein contained, which were not varied or revoked by the codicil.

Lord Milford died on the 28th of November, 1823: Mrs. Booker died in the month of January, 1826, leaving the defendant Dr. Booker her surviving, and the four infant plaintiffs, her children: and the bill was filed by the infants claiming for themselves and their father the benefits of the two provisions made by the will and settlement.

[\*299]     \*It was argued for the plaintiffs, that the rule of presumption against double portions did not apply in this case; Lord Milford not being the parent nor to be considered in *loco parentis*: that, if Lord Milford could be considered as standing in *loco parentis*, the provisions in the settlement were of a different nature from those in the will; and that, after making the settlement, the provisions by the will were expressly confirmed by the language of the third codicil.

In the argument it was made a question, whether parol evidence was admissible to prove that a testator was to be considered as having placed himself in *loco parentis*. I find no authority for excluding such evidence; and inasmuch as the conclusion is to arise from facts extrinsic of the will, I am of opinion, that parol evidence is admissible for such purpose. I am further of opinion, that Lord Milford is to be considered as having placed himself in *loco parentis*: it being established by the evidence, that Lord Milford had not only contributed to the maintenance and education of Mrs. Booker, who appears to have been one of his nearest relations, from the time she lost her father in her early infancy, but that he was consulted as to the plan of her education, and was regarded by Mrs. Booker as the person whose consent was necessary to her marriage, and that he had expressly taken upon himself the obligation to make a provision for her in that event.

The presumptions against a double portion, which arise in the case of two provisions made by a parent, arise in the case of the

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two provisions here, and are to be fortified or repelled by intrinsic or extrinsic evidence. In this case the provisions by the two instruments can hardly be considered substantially of the same nature; so as to afford intrinsic evidence against a double provision; but it is proved by Lord Milford's solicitor, \*who prepared the settlement, that, when, by the desire [\*300] of Dr. and Mrs. Booker, he applied to Lord Milford upon the subject of the settlement, Lord Milford stated that Dr. and Mrs. Booker ought to have been satisfied with his assurance that he would make his will as he had promised to do, and that when Lord Milford consented to execute the settlement, he directed his solicitor to inform Dr. and Mrs. Booker that the settlement was in lieu of the provision which he had promised to make by his will. The extrinsic evidence, therefore, excludes the intention of a double provision.

Being of opinion, that Lord Milford is to be considered as having placed himself in *loco parentis*, it is not material to the decision to say what would have been the effect of this declaration of his intention, if he could not be so considered.

It is argued that the third codicil, which was made by Lord Milford long after the settlement, and which in words ratifies and confirms the will and all devises and bequests therein contained and not altered or revoked by the codicil, manifests an intention on the part of Lord Milford in favor of the double provision. In my judgment, the true construction of this codicil is, that the will is to have the effect which it would have had, if the codicil had not been made, except as altered by the codicil, and that if the double provision would not have taken place if the codicil had not been made, it will not be set up by that codicil. This reasoning is consistent with the decision in *Crosbie v. Macdoul*,<sup>(a)</sup> and the other cases which have been cited.

Declare therefore that the provision made by the settlement for Dr. and Mrs. Booker and their children, is a satisfaction of the provision intended for Mrs. Booker and her children by the will.

(a) 4 Ves. 610.

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[\*301]

CARVER v. BOWLES.

ROLLS.—1831: 19th and 20th January.

A testator, by his will reciting that he had on the marriage of two of his daughters, advanced and transferred for their respective benefit 500*l.* sterling and 900*l.* bank stock, bequeathed 500*l.* sterling and 900*l.* bank stock in trust for his remaining daughter Francisca during her life, to her separate use, without power of anticipation or alienation; then for her children, subject to an exclusive power of appointment by her; and if there were no children in whom the fund should vest, for such person, &c., as she should appoint: Francisca afterwards married; and, on her marriage, her father advanced to her 500*l.*, and transferred to the trustees of her marriage settlement 900*l.* bank stock in trust for her separate use during her life; then for her husband during his life; and after his decease for the children of the marriage; but if she died in the lifetime of her husband without leaving any child, then to her husband absolutely; and if he died in her lifetime without leaving any child by her, to her absolutely: Held, that the provision made for Francisca on her marriage was an ademption of the legacies of 500*l.* and of 900*l.* bank stock.

THE will of H. C. Bowles, dated the 18th of April, 1827, contained, among other bequests, the following: "And whereas, having on the marriage of my daughters, Anne Sarah Treacher and Jane Mary Reeves, with their respective present husbands, advanced and transferred to or for the benefit of each of them the sum of 900*l.* in the stock of the Governor and Company of the Bank of England, and also given to each of my said daughters the sum of 500*l.* sterling, I do hereby give and bequeath the like sum of 900*l.* like bank stock, and the like sum of 500*l.* sterling unto my youngest son John Bowles; and I do also give and bequeath the like sum of 900*l.* like bank stock, and the like sum of 500*l.* sterling, unto my executors and trustees hereinafter named, to be by them held and applied upon and for the same trusts, intents, and purposes, for the benefit of my daughter Francisca Bowles and her issue, as are hereinafter expressed and directed of and concerning the one fifth part hereinafter bequeathed in favor of my said daughter and her issue, of and in my residuary personal estate."

These trusts were, to pay the interest to the daughter during her life, to her separate use, and without power of

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\*anticipation or alienation ; after her decease, for all and [\*302] every or any one or more of her children in such shares as she should by deed or will appoint ; in default of appointment, for all her children equally, who being sons should attain twenty-one, or being daughters should attain twenty-one or marry ; in default of such children, for such trusts and purposes as she should by deed or will appoint ; and in default of such appointment, for the person, who, at the time of her decease, would have been her next of kin, if she had died intestate and unmarried.

In the year, 1829, Francisca intermarried with Henry Treacher ; and upon that occasion the testator advanced to her 500*l.* in money, and transferred 900*l.* bank stock into the names of the trustees of her marriage settlement. The trusts declared of the bank stock by the settlement were, for Francisca during her life, to her separate use ; then to her husband Henry Treacher for life ; then to the children of the marriage as therein mentioned ; but if Francisca died in the lifetime of her husband without leaving any child, then to Henry Treacher absolutely, and if he died in her lifetime without leaving any child by her, to Francisca absolutely.

One of the questions in the cause was, whether the legacies of the 900*l.* stock and the 500*l.* sterling were adeemed or satisfied by the advance of 500*l.* on her marriage, and the settlement which was then made of the 900*l.* stock.

On the one hand, it was contended that the two provisions were so essentially different, that the one could not be a satisfaction of the other. The interests in the 500*l.*, which were secured to the wife and her children by the will, were entirely annihilated, without any compensation \*to them, if the [\*303] rule against double portions were applied here : and even as to the bank stock, the benefits, which the wife and children took under the settlement, were altogether different from and of much less value than those which they took under

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the will. The provisions made by the will extended to the children of any marriage which Francisca might contract; the settlement was confined to the children of the marriage with Henry Treacher.

The argument on the other side proceeded chiefly on the language of the will, which, it was said, showed clearly that the legacy was given as an equivalent for the portions which the other daughters had received, when they married; so that the legatee, having afterwards married in the lifetime of her father and received from him on that occasion a suitable portion, could not also claim the bequest which was manifestly intended to be a portion.

Mr. O. Anderdon, for the plaintiffs.

Mr. Bickersteth, Mr. Pemberton, Mr. Tinney, Mr. Treslove, Mr. Coote, Mr. Duckworth, and Mr. Teed, for the different defendants.

THE MASTER OF THE ROLLS held that the legacies to Francisca and her children were adeemed by the provision made for her on her marriage.

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"And his Honor doth declare that the legacies of 900*l.* bank stock and 500*l.* given to the defendant Francisca Treacher, by the will of the testator, have been adeemed."—Reg. Lib. 1830. A. 1018.

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1831: 19th and 20th January.

A testator having, under a settlement, a power of appointing by a will a sum of 7,150*l.* bank stock, in respect of which three bonuses had been paid and invested since the date of the settlement, by his will, after mentioning the original amount of stock, and making an erroneous reference to the first bonus, as then consisting of 715*l.* 5 per cent. stock, appointed the said sum of 7,150*l.* bank stock and the said sum of 715*l.* 5 per cent. bank annuities, "together with all such further additions in the nature of profit to be made to the said bank stock in his lifetime:" Held, that the appointment extended to all the bonuses.

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A testator having a power under his marriage settlement to appoint a fund among his children, appointed it to his two sons and three daughters in equal shares; and then declared that the shares appointed to his daughters should be held on the same trusts for the benefit of his daughters and their issue as were therein expressed concerning the shares of his residuary estate bequeathed to each daughter and her issue: under these trusts the daughters took in their respective shares of the residue a life interest to their separate use, but without power of anticipation or alienation: Held,

That the shares of the settled fund were well appointed to the daughters absolutely, but to their separate use during their respective lives, and without power of anticipation or alienation:

That no case of election was raised in favor of the issue of the daughters against the daughters or their husbands.

\*By an indenture, dated the 16th of January, 1799, [\*304] which was executed in contemplation of the marriage of the testator H. C. Bowles and Ann Garnault, a sum of 7,150*l.* bank stock, which had belonged to Mr. Bowles, was settled upon the husband and wife and the survivor of them for life; and after the decease of the survivor, upon trust to transfer the bank stock unto, between, and amongst all and every the child and children, or such one or more child or children, or an only child of the said marriage, at such time or times, in such shares, proportions, manner and form, and with, under and subject to such powers, provisos, conditions, restrictions, and limitations over (such limitations over to be for the benefit of some one or more of such children, or his, her or their issue), as the said H. C. Bowles and Ann Garnault should, in manner therein mentioned jointly appoint; and for want of such joint appointment, as the survivor of them should, after the death of the other, by deed, or by his or her will, or any codicil thereto, direct or appoint; and in case of no such direction or appointment by them, or by the survivor of them, and as to so much whereof no such direction or appointment should be made, upon trust for all the children in equal shares, and if but one, then to such only child, and to be paid and transferred at the times therein mentioned.

\*The marriage took place; there were five children [\*305] of the marriage, two sons and three daughters: and

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the wife died in the lifetime of the husband without having joined in any appointment of the bank stock.

In June, 1799, there was paid in respect of the 7,150*l.* bank stock, a bonus of 715*l.* five per cent. bank annuities, which sum was transferred into the names of the trustees of the settlement; and in the following December, a memorandum, signed by the husband and wife, was indorsed on the settlement, by which it was declared that the 715*l.* five per cent. stock was to be subject to the trusts which the indenture declared concerning the bank stock. In the year 1802, a bonus in money was paid, which Mr. Bowles invested in the purchase of bank stock in the names of the trustees; and in June, 1816, an addition of 25 per cent. was made to the stock by way of bonus. By these means, the bank stock in the names of the trustees was augmented to 9,216*l.*

The will of H. C. Bowles, dated the 18th of April, 1827, after reciting that, by his marriage settlement and the indorsement upon it, 7,150*l.* bank stock, and 715*l.* five per cent. bank annuities, being an addition made to the bank stock in the nature of profit, were standing in the names of trustees in trust, after his decease, for all or any one or more of his children, and in such manner, &c., as he should by will appoint, proceeded in the following words—"Now, in pursuance of the said power or authority to me given or reserved in and by my said marriage settlement, and by force and virtue thereof, and of every power or authority to me given or reserved, or enabling me in this behalf, I do, by this my last will, &c., direct and appoint, give and bequeath the said sum of 7,150*l.* bank stock, so mentioned in my said [\*306] marriage settlement, and also the \*said sum of 715*l.* five per cent. bank annuities, together with all such further additions in the nature of profit to be made to the bank stock in my lifetime, unto my five children, Henry Carrington Bowles, Ann Sarah Treacher, Jane Mary Reeves, Francisca Bowles, and John Bowles, equally to be divided among them, share and share alike. But I do hereby will and declare, that one fifth part or share, so appointed and bequeathed to each of my said three

daughters, of and in the said 7,150*l.* bank stock, and 715*l.* five per cent. bank annuities, is so appointed and bequeathed, and I do hereby, so far as I lawfully or equitably may or can, order and appoint, that the same shall be held and applied by my executors and trustees hereinafter named, upon and for the same trusts, intents and purposes, for the benefit of each of my said daughters and their issue, as are hereinafter expressed and directed of and concerning the one fifth part or share hereinafter bequeathed in favor of each such daughter and her issue, of and in my residuary personal estate." These trusts were the trusts stated in the former part of this report. The will also contained a proviso "that no child, taking a share under any such appointment as aforesaid, shall be entitled to any further or other share of and in the remaining or unapplied part or parts of the said one fifth part, unless and until he or she have brought his or her appointed share into hotchpot, and shall have accounted for the same accordingly."

At the date of the will, the 715*l.* five per cents had been converted into a larger amount of 3 per cent. stock.

Under these circumstances the following questions were raised.

\*I. Whether the appointment extended to the bonuses [\*307] of 1802 and 1816, or was confined to the original sum of 7,150*l.* bank stock, and the stock into which the 715*l.* five per cent. bank annuities were converted.

Mr. *Tinney* and Mr. *Teed* argued, that by the express words of the will, the appointment was limited to the original amount of stock and the first bonus, and to such additions by way of bonus, as might be made after the date of the will; and that there were no words which could be fairly extended to the intermediate bonuses.

THE MASTER OF THE ROLLS was of opinion that the erroneous allusion in the will to the 715*l.* as an existing five per cent. stock,



though it had been long converted into a different amount of a different stock, showed that the testator was not acquainted with the particulars of which the accumulated fund consisted, and that his intention was to appoint the whole of that fund which was vested in the trustees of the settlement.

II. As the appointment was bad so far as it attempted to create trusts in favor of the children of the daughters, the grandchildren of the testator not being within the objects of the power, a second question was, whether the shares were well appointed to the daughters absolutely, or whether after the life estates given to the daughters, these shares were to be considered as unappointed.

If the shares were well appointed to the daughters absolutely, another question was, whether the restriction against anticipation or alienation and the limitations to the separate use of the daughters during their lives were valid, having regard to the terms of the power contained in the settlement.

[\*308] \*THE MASTER OF THE ROLLS held that the words of appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue, being inoperative, did not cut down the absolute appointment; but that it was competent to the donee of the power to limit the interests, which he appointed to his daughters, to their separate use, and to restrain them from anticipation or alienation.

III. It was then contended on behalf of the issue of the daughters, that, as the testator had manifested a plain intention that the children of the daughters should take interests in the settled fund, and as, by the same instruments, he gave to his daughters shares of his residue, a case of election was raised against the daughters; and the daughters were bound to elect between giving effect to the appointment in favor of their chil-

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dren and the interests which they, the daughters, took under the will: *Whistler v. Webster*.(a)

THE MASTER OF THE ROLLS held that, the testator having made an absolute appointment in the first instance, no case of election was raised.

Declare that the original fund of 7,150*l.* bank stock, in the indenture of the 16th of January, 1799, mentioned, and all the additions in the nature of profit which have been made thereto, are well appointed by the will of H. C. Bowles to the defendants Henry C. Bowles, John Bowles, Ann Sarah Treacher, Jane M. Reeves and Francisca Treacher, the testator's children, in equal shares, and that, subject to the limitations and restrictions hereinafter \*mentioned, E. T. Treacher and Ann [\*308] Sarah his wife, in her right, J. Reeves and Jane Mary his wife in her right, and H. Treacher and Francisca his wife in her right, are absolutely entitled each to one fifth share of the trust fund and additions, but that the shares appointed to Ann Sarah Treacher, Jane Mary Reeves, and Francisca Bowles, are limited to their respective separate use for life, independent of any present or future husband, and are to be held and enjoyed by them without power to make any assignment or appointment by way of alienation."—Reg. Lib. 1830, A fol. 1018.

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\*LLOYD v. HARVEY.

[\*310]

ROLLS.—1832: 23d June.

The testator, upon the marriage of a daughter, entered into a bond for the payment of 5,000*l.* within six months after his decease to the trustees of his daughter's settlement, the interest to be paid to the husband for life; and after his decease, if the wife survived him, and there were children of the marriage, 1,000*l.*, part of the 5,000*l.*, to be paid to the wife, and the remainder to be applied for the use of the children of the marriage; but if there were no children, 2,000*l.* to be paid to

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the wife, and the remainder of the 5,000*l.* to be paid to the executors and administrators of the husband; and in case the husband survived the wife, and there were no children, then the whole of the 5,000*l.* to the husband. The testator afterwards made his will, and gave his daughter 5,000*l.*, stating it to be in addition to what he had secured upon her marriage. About five years afterwards the testator executed a deed whereby he covenanted that his executors should pay to the trustees within six months after his death, the sum of 5,000*l.* upon the trusts of the settlement. Parol evidence of the declarations of the testator was admitted to prove that he did not intend a double portion.

*Quære*, Whether the different interests of the husband, wife, and children in the legacy of 5,000*l.*, and in the sum of 5,000*l.* given by the deed, would repel the common presumption against double portions?

THE late Admiral Sir Eliab Harvey, upon the marriage of the plaintiff, William Lloyd, with the co-plaintiff, Louisa his wife; who was Sir Eliab's eldest daughter, entered into a bond for securing to the trustees of the settlement the payment of a sum of 5,000*l.* within six months after his decease, with interest for the same from the day of his death, at the rate of 5 per cent.

By the marriage settlement of Mr. and Mrs. Lloyd, bearing date the 2d of October, 1804, the interest of the said sum of 5,000*l.* was given to the plaintiff, the husband, for life; and after his decease, if the wife should survive him, and there should be issue of the marriage, the trustees were to pay the sum of 1,000*l.* to the wife, and were to apply the remainder, or in case the husband should survive the wife, then the whole of the 5,000*l.* to the use of the children of the marriage in manner therein mentioned; but in case there should be no children of the marriage who should attain a vested interest in the sum of 5,000*l.*, and the wife should survive the husband, then [\*311] they were to \*pay the sum of 2,000*l.* to the wife, and the remainder of the 5,000*l.* to the executors and administrators of the husband, or in case the husband should survive the wife, and there should be no child of the marriage who should attain a vested interest in the 5,000*l.*, then the whole of such sum to the husband, his executors and administrators.

The testator had five daughters, and his will, bearing date the ninth day of June, 1818, was partly in the fol-

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lowing words: "And whereas, upon the marriage of my daughter Louisa Lloyd, I secured to the trustees of her marriage settlement the sum of 5,000*l.*, of which I have since paid 2,000*l.*; now I give and bequeath to my said daughter Louisa Lloyd the sum of 5,000*l.* in addition to what I secured upon her marriage as aforesaid. And whereas, upon the marriage of my daughter Georgianna Drummond, I paid the sum of 2,000*l.* and secured the further sum of 8,000*l.* as her portion to the trustees of her marriage settlement, therefore it is not my intention to make any further bequest by this will to my said daughter Georgiana Drummond. And I give and bequeath the sum of 10,000*l.* to each of my daughters Emma Harvey, Maria Harvey, Elizabeth Harvey, and Mary Harvey: and I direct the said several sums of 10,000*l.*, to be paid to my said daughters, respectively within six calendar months after my decease, with interest for the same after the rate of 4*l.* 10*s.* per cent. per annum from the day of my decease." The testator, by the same will, devised his real estates to his only son in fee; and in case his son should die under twenty-one, then all his daughters, who survived the son, were to succeed to the real estates as tenants in common in fee.

The son died under twenty-one, in March, 1823.

\*By an indenture bearing date the 18th of June, [\*312] 1823, to which the testator, the plaintiff, William Lloyd, and two trustees, were parties, and which was indorsed on the back of the settlement, after reciting that the testator was minded and desirous from love and affection for his daughter Louisa, the wife of the said William Lloyd, to make such further provision for them and their issue as thereafter mentioned, the testator covenanted with the trustees that his heirs, executors and administrators should, within six months after his decease, pay to the trustees the sum of 5,000*l.* with interest for the same after the rate of 4*l.* 10*s.* per cent., upon the same trusts as by the indenture of settlement were declared concerning the sum of 5,000*l.* therein mentioned.

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On the 11th of February, 1830, the testator made a codicil to his will in the following words: "This is a codicil to be added to and taken as part of the last will and testament of me, Sir Eliab Harvey, of Rolls, in the parish of Chigwell, in the county of Essex, K. G. C. B., which will bears date the 9th day of June, 1818. Whereas, upon the marriage of my daughter Maria Tower, I secured to the trustees of her marriage settlement the sum of 10,000*l.* as her portion; and whereas, in contemplation of the intended marriage of my daughter Emma Harvey with Colonel William Cornwallis Eustance, I have invested the sum of 2,000*l.* in the funds in the names of the trustees of her marriage settlement, and have this day executed a bond for securing to the same trustees a further sum of 8,000*l.*, making together the sum of 10,000*l.* as the portion of my said daughter Emma Harvey: Now, therefore, I do hereby declare that the portions so provided by me for the benefit of my said two daughters respectively as aforesaid, are to be considered as in lieu of [\*313] the legacies of \*10,000*l.* given and bequeathed by my said will to each of my said two daughters respectively; and I do hereby revoke the said legacies of 10,000*l.* given to each of my said two daughters Maria Tower and Emma Harvey respectively: but I do hereby declare that the said legacy of 10,000*l.* given and bequeathed by my said will to my daughter Emma Harvey, is revoked only in the event of the said portion provided for her by me on her now intended marriage, becoming payable by the said marriage being duly had and solemnized."

The testator died on the 20th of February, 1830.

The bill was filed by the plaintiffs, William Lloyd and Louisa his wife, claiming to be entitled to the sum of 5,000*l.* mentioned in the indenture of the 18th of June, 1823, and also to the legacy of 5,000*l.* given to the plaintiff Louisa by the will: and the only question in the cause was, whether the 5,000*l.* mentioned in that indenture was or was not an ademption of the same sum given by the will.

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Miss Perceval, a friend of the family, who was examined as a witness, gave the following evidence: "That she was extremely well acquainted with the testator, Sir Eliab Harvey, from her earliest recollection until his death, and was upon the most intimate and familiar terms of friendship with him and his family up to that event, and in the habit of constant intercourse with him and them; that she was staying with him at his house for the last month of his life; that the testator in his last illness was frequently in the habit of sending for her into his room, where he was confined by illness, and of conversing with her very freely respecting his property and affairs, and the disposition \*he intended to make of his property by his will; [\*314] that she could not at the time of her examination call to mind any particular conversation with the testator, or any communication of his respecting the disposition of his property amongst his daughters that had been impressed upon her memory, except one which she had a perfect recollection of, and which was to the following effect: In the course of one of the general conversations with the deponent respecting his property, the testator took occasion to state to the deponent, that it was his intention to make an equal distribution of his property amongst his daughters, and that he entertained an equal affection for them all, and intended not to show any preference towards one above any of the others, nor to give Mrs. Lloyd a larger share because she was the eldest, but that it was his wish and intention that his daughters should all take an equal share in his property, or the testator expressed himself in terms to that effect; that this conversation occurred in the course of the testator's last illness, and, as near as she could recollect, about three weeks before his death."

Mr. *Pemberton* and Mr. *Stuart*, for the plaintiffs.

Mr. *Bickerteth* and Mr. *Tinney*, for the defendants.

Both on the general question, and on the point of the admissi-

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bility of the parol evidence, *Weall v. Rice*(a) and *Booker v. Allen*(b) were referred to, and the leading authorities which were cited in these cases. The plaintiffs relied also on the circumstance, that the testator, after he made a settlement on Maria Tower and his daughter Emma, executed a formal codicil, for the express purpose of declaring that the portions so [\*315] provided \*for these daughters were in lieu of the legacies given them by the will; and it was argued, that if he had entertained the same intention with respect to Louisa, he would have manifested it in the same or a similar manner.

THE MASTER OF THE ROLLS:—If the will could receive the construction which has been contended for by the counsel of the defendants, and it could be considered that the legacy of 5,000*l.* was given upon the trusts of the settlement, there would be an end of all question, and the common presumption would apply, that the legacy of 5,000*l.* was adeemed by the 5,000*l.* mentioned in the indenture of the 18th of June, 1823. It is probable that such might be the intention of the testator, but it does not appear to me that he has sufficiently expressed such intention. It is, therefore, insisted for the plaintiffs, that the daughter Louisa, or her husband in her right, would have taken the legacy of 5,000*l.* unfettered by the trusts of the settlement; and that it cannot be adeemed by the 5,000*l.* given by the indenture of the 18th of June, 1823, upon the trusts of the settlement, because, by the settlement, the daughter surviving her husband would take only 1,000*l.*, part of the 5,000*l.*, if there were children of the marriage, and only 2,000*l.*, if there were no children of the marriage. It is, however, to be observed, that both sums of 5,000*l.* are given as additions to the portion of the daughter, and are provisions for the family, and in that respect have the same character; and, referring to the case of *Trimmer v. Bayne*,(c) it appears to me questionable, whether the different interests of the wife and children in the two sums would defeat the presumption which is raised against double portions.

(a) P. 251. *supra*.(b) P. 270. *supra*.

(c) 7 Ves. 508.

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\*If, however, by reason of such differences, the common presumption be not admissible in this case, there is evidence which establishes that it was not the intention of the testator to give both sums. The will itself manifests, that it was the intention of the testator that all his daughters should benefit equally by his bounty; the same sum of 10,000*l.* is in effect provided for each of the six daughters; and in the event of the son dying under twenty-one, all the daughters who may be then living are to succeed to his real estate in equal shares. [\*316]

I consider the codicil as rather confirming than repelling the presumption that the testator intended equality amongst his daughters. The marriages of the two daughters mentioned in it had been recent; and the indenture of 1823, having been made seven years before, might well not be present to his memory.

The evidence of Miss Perceval appears to me to be admissible, not upon the ground of fortifying or repelling a presumption, but as extrinsic evidence that it was not the intention of the testator to make a double provision for his daughter Louisa.

The bill, therefore, must be dismissed, but without costs.

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\*SHEFFIELD v. THE EARL OF COVENTRY. [\*317]

ROLLS.—1833: 17th April.

A testator, upon the marriage of a daughter, entered into a bond conditioned for the transfer to the trustees of her settlement, during his life, or within twelve months after his decease, of 10,000*l.* 4 per cent. bank annuities; the only 4 per cent. bank annuities then existing were afterwards reduced to 3 1-2 per cents.; but there was existing at the time of his death a new 4 per cent. stock, which had been created two years after the reduction of the old 4 per cents: the bond is satisfied by a transfer of 10,000*l.* 3 1-2 per cents.

The same testator by his will gave to a son a legacy of 20,000*l.* in "the joint stock of the 4 per cent. bank annuities, transferable at the Bank of England, commonly called four per cent. bank annuities:" the only 4 per cent. bank annuities existing



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at the date of his will were reduced to 3 1-2 per centa. ; afterwards, and before his death, a new stock of 4 per cent. bank annuities was created: the will speaks at the testator's death, and the son is entitled to a sum of 20,000*l.* in the then existing 4 per cent. bank annuities.

A testator by his will gave to his daughter Sophia and her children, under certain circumstances, a sum of 10,000*l.* 4 per cent. annuities, and directed that, with the exception of certain sums, of which this was not one, and which were expressly ordered to be brought into hotchpot, the legacies bequeathed to any of his children were to be, not in satisfaction of, but in addition to any portion or provision to which they were or should be entitled under any articles or settlement then already executed by him; afterwards, upon her marriage, a sum of 10,000*l.* 4 per cent. bank annuities was settled upon Sophia, her husband and her children: she is not entitled to both provisions, notwithstanding the difference in the limitations.

The testator, on the marriage of another daughter without his consent, revoked a bequest of 10,000*l.* 4 per cent. bank annuities which he had made by the same will in favor of that daughter and her children, and gave her a life interest in a sum of 5000*l.* 4 per cent. bank annuities; he afterwards settled 10,000*l.* on her and her children, and by a codicil declared the settlement to be in satisfaction of the legacy: this circumstance, even coupled with the difference of the provisions, and the language of the will, is not sufficient to repel the presumption against double portions in the case of the daughter Sophia.

THE late Earl of Coventry, in contemplation of a marriage between his daughter Lady Sophia and Sir Roger Gresley, executed a bond, dated the 19th of May, 1821, in the penal sum of 20,000*l.* to Lord Deerehurst and John Scudamore, the intended trustees in Lady Sophia's marriage settlement, in which the condition was as follows: "Now the condition of the above written obligation is such, that if the said intended marriage between the said Sir Roger Gresley and Lady Sophia Coventry shall not be duly solemnized within the space of twelve calendar months, to

be computed from the date of the above written obligation; or in \*case such marriage shall be duly solemnized within the space of twelve calendar months, computed as aforesaid, and the said George William Earl of Coventry shall, at any time thereafter during his life, or the heirs, executors or administrators of the said George William Earl of Coventry, within the space of twelve calendar months next after his decease, transfer or cause to be transferred into the names or name of the said Lord Viscount Deerehurst and John Scudamore, or the survivor of them, or the trustee or trustees for the time being of

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the said indenture of settlement, bearing even date with the above written obligation, the sum of 10,000*l.* four per cent. bank annuities in the books of the Government and Company of the Bank of England kept for entering transfers of such stock ; and if the said George William Earl of Coventry, his heirs, executors or administrators, shall and do in the meantime, until such transfer is made as aforesaid, well and truly pay or cause to be paid to the said Lord Viscount Deerhurst and John Scudamore, or the survivor of them, or such other trustee or trustees for the time being as aforesaid, the annual sum of 400*l.* of lawful money of Great Britain, being the amount of the yearly dividends payable in respect of the said 10,000*l.* 4 per cent. bank annuities, on or at the respective days or times when the dividends of that stock shall be payable at the Bank of England ; then and in either of such cases the above written obligation shall be void, otherwise shall be and remain in full force and virtue."

The settlement referred to was of even date with the bond, and made a provision for Lady Sophia and the children of the marriage out of Sir Roger Gresley's real estates. As to the 10,000*l.* four per cent. bank annuities secured by the bond, and the 400*l.* a year which Lord \*Coventry was [\*319] to pay till the stock was transferred, the trustees were, during the joint lives of Sir Roger and Lady Sophia, to pay 200*l.* a year, part of the 400*l.*, to Lady Sophia, for her separate use, by way of pin money, and the remaining 200*l.* a year to Sir Roger Gresley. After the death of either, the whole 400*l.* a year was to be paid to the survivor ; and upon his or her death, the capital was to go to the children of the marriage, as the parents jointly or the survivor should appoint, and, for want of such appointment, to the children equally in manner therein mentioned.

The marriage between Lady Sophia and Sir Roger Gresley was immediately solemnized. In the year 1824, the 5 G. 4, c. 11, reduced the only 4 per cent. bank annuities, which existed at the date of the bond, to 3 1-2 per cent. bank annuities : and

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it was thereby provided,<sup>(a)</sup> that all bonds and contracts for the transfer of the 4 per cent. bank annuities should be fully satisfied by the transfer of an equal sum in the new 3 1-2 per cent. annuities.

[\*320] \*In the year 1822, the 5 per cent. bank navy annuities were by the 3 G. 4, c. 9, reduced to 4 per cent. annuities; and in the year 1830, these latter annuities were reduced by the 11 G. 4, and 1 W. 4, c. 13, to a 3 1-2 per cent. fund.

The 7 G. 4, c. 39, which received the royal assent on the 5th of May, 1826, created a new stock called 4 per cent. bank annuities of 1826, which was not to be redeemable till after the 5th of April, 1833.

The Earl of Coventry died on the 25th of March, 1831, having during his life duly paid to the trustees of Lady Sophia's marriage settlement 400*l.* a year according to the condition of the bond, but not having made any transfer of stock to them.

The first question in the cause was, whether the condition of the bond was to be satisfied by a transfer of the sum of 10,000*l.* in the 3 1-2 per cent. bank annuities, to which the 4 per cent. annuities existing at the date of the bond had been reduced, or

(a) The sixteenth section of the 5 G. 4, c. 11, provided, "That in every case in which any person or persons shall at the time of the passing of this act be or remain bound by the condition of any bond or obligation, or by the terms of any instrument in writing, or by any agreement or contract, to transfer any amount of capital stock in the said 4 per cent. annuities respectively, the condition of every such bond or obligation, or the terms of any such instrument in writing, or agreement or contract, shall be deemed in law and equity to be satisfied, by making a transfer of an equal amount of capital stock in the reduced 3 1-2 per cent. annuities; and that where any party is by the condition of any such bond or obligation, or the terms of any such instrument in writing, or agreement or contract, bound or required to pay half yearly sums, equal to the dividends, on any specified amount of any such 4 per cent. annuities respectively, every such bond, obligation, instrument, agreement or contract, shall be satisfied by the payment of half yearly sums equal to the dividends of or upon the same amount of the said 3 1-2 per cent. annuities."

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by a transfer of 10,000*l.* in the new 4 per cent. annuities, which did not exist at the date of the bond, but existed at the death of the Earl of Coventry.

Mr. *Pemberton* and Mr. *Lowndes*, for the plaintiffs, who were trustees and executors.

Mr. *Tinney* and Mr. *Spence* for Sir Roger and Lady Sophia Gresley.

By the words of the bond, Lord Coventry was bound at the time of his death to transfer to the trustees of Lady Sophia's settlement 10,000*l.* four per cent. bank annuities; there existed at that time, and there exists now, a 4 per cent. stock; and there is no reason why \*the condition should not [\*321] be fulfilled literally. The obligor and his representatives were allowed to discharge their obligation at any time not exceeding a year from his decease; but at whatever time the obligation was to be discharged, it could be done only by a transfer of stock, which at the time bore 4 per cent. interest. The case does not come within the sixteenth section of the 5 G. 4, c. 11; for that clause applies only to bonds and contracts "to transfer any amount of capital stock in *the said* 4 pounds per centum annuities." Here the instrument has no reference to any particular species of stock as existing at any time except the time of transfer. It is clear that the intention was, that the trust fund should produce 400*l.* a year, at least during the joint lives of Sir Roger and Lady Sophia, and during the life of the survivor of them: and that intention will be entirely disappointed if the bond is held to be satisfied by a transfer of 10,000*l.* 3 1-2 per cent. stock.

Mr. *Bickersteth* and Mr. *James Russell* contra.

The only 4 per cent. bank annuities which existed at the date of the bond, or for some time afterwards, were the annuities which were reduced by the 5 G. 4, c. 11. That must, therefore,

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have been the stock which the bond contemplated, unless it is to be held that Lord Coventry was bound by a contract which had no reference to any existing subject. The condition of the obligation speaks of "the books of the Governor and Company of the Bank of England, kept for entering transfers of such stock;" and the half yearly payment of 200*l.* until the stock is transferred, is to be made "at the respective days or times when the dividends of that stock shall be payable at the Bank of England." These expressions have a plain reference to an actually existing stock. Lord Coventry, therefore, was a person who, at the time of the passing of the 5 G. 4, c. 11, was [\*322] bound to transfer \*at some future time a given amount of the capital of the bank annuities which that act reduced; and his obligation is satisfied by transferring an equal amount of the 3 1-2 per cent. stock.

THE MASTER OF THE ROLLS:—I am of opinion that the condition of the bond plainly referred to a sum of 10,000*l.* in the 4 per cent. bank annuities then in existence, and that, according to the express provision of the 5 G. 4, this contract will be fully satisfied by a transfer of 10,000*l.* three and a half per cent. bank annuities, into which the 4 per cent. bank annuities were by that statute reduced.

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The Earl of Coventry made his will, dated the 8th of July, 1818, which was partly in the words following: "As to, for and concerning all the rest and residue of my personal estate and effects whatsoever not hereinbefore by me otherwise disposed of, and all such sum or sums of money as are hereinbefore directed to become and constitute part thereof, I give and bequeath the same and every part thereof unto Sir Robert Sheffield and Henry Pitcher Boyce, their executors, administrators and assigns, upon the trusts, and for the intents and purposes by this, my will, expressed and declared of and concerning the same (that is to say), upon trust that my said trustees, or the survivor of them, or the executors, administrators or assigns of

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such survivor, do and shall appropriate and apply so much thereof as shall be requisite for that purpose (after deducting all expenses), in the purchase of 20,000*l.* interest or share in the capital or joint stock of the annuities transferable at the Bank of England, commonly called 4 per cent. bank annuities."

Then, after declaring the trusts of this sum of stock

\*for two of his daughters, the will proceeds thus: [\*323]

"And upon further trust that my said trustees, or the survivor of them, or the executors, administrators and assigns of such survivor, do and shall, out of the said residue of my said personal estate (after the application of part thereof as hereinbefore directed), appropriate and set apart so much thereof as will be sufficient to purchase the further sum of 20,000*l.* interest or share in the capital or joint stock of the said annuities transferable at the Bank of England, commonly called 4 per cent. bank annuities, and do and shall stand and be possessed of and interested in the same bank annuities, when so purchased as aforesaid, and receive the dividends, interests and annual produce thereof, and pay, apply and dispose of the same during the life of my son, John Coventry, to such person or persons, and for such intents and purposes, and in such manner as my said son shall, from time to time, by any draft, note, order, or writing signed by him (but not by way of anticipation), direct and appoint, and in default of, or subject to any such direction or appointment, do and shall pay such interest, dividends and annual produce into the proper hands of my said son for his sole use and benefit during his lifetime." Subject to various provisos, and with various limitations over.

At the date of the will there were no other 4 per cent. bank annuities than those which were reduced to 3 1-2 per cent. annuities in 1824, by the 5 G. 4, c. 11.

The twentieth section of the 5 G. 4, c. 11,(a) provided that trusts, affecting the 4 per cent. bank annuities \*there- [\*324]

(a) That section enacted, "That all trusts, whether created by will or otherwise, and which existed either in the whole or in part, and all directions contained in any

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by converted, should be satisfied by an equal amount of the new 3 1-2 per cents.

The Earl of Coventry afterwards made a codicil to his will, bearing date the 21st day of July, 1818, and a second codicil to his will bearing date the 11th day of July, 1825, but did not by either of them alter or affect the legacy of 20,000*l.* given by the will for the benefit of his son John Coventry. The only 4 per cent. annuities which existed at the date of the last codicil, were the new 4 per cent. annuities, which had arisen in July, 1822, from the conversion of the navy 5 per cents. under the 3 G. 4, c. 9.

The second question in the cause was, whether this legacy was to be satisfied by a transfer of the sum of 20,000*l.*, 3 1-2 per cent. bank annuities, into which the 4 per cent. bank annuities existing at the date of the will had been reduced; or by a transfer of 20,000*l.* of the 4 per cent. bank annuities, existing at the death of the Earl of Coventry.

Mr. *Lynch*, for John Coventry.

The question is not affected by the decision of the court on the bond. The bond has reference to the state of things  
 [\*825] \*which existed at the time of its execution; the will speaks at the death of the testator, and must mean 4 per cent. stock then existing: *Banks v. Sladen*.(a)

will or devise or testamentary paper which remains unexecuted at the time of the passing of this act, as to any 4 per cent. annuities which may under this act be converted into 3 1-2 per cent. annuities, or as the payment or distribution of any dividends thereon, or as to the transfer of any such annuities in any events specified in any such trusts or will or testamentary paper, shall extend and be deemed and construed in all cases and in all courts of law and equity in the United Kingdom, or elsewhere in any dominions or territories belonging to his Majesty, to extend and to apply to all such 3 1-2 per cent. annuities, created in lieu of any 4 per cent. annuities, subject to or affected by any such trusts or devises or wills or testamentary papers, for all purposes, and in all cases in which such trusts or to which any such directions can be made applicable."

(a) 1 Russ. & Mylne, 216.

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*Mr. Bickersteth and Mr. James Russell, contra.*

The will must be read with reference to the state of things at the time when it was made. It speaks—not of any stock to be afterwards created—but of a stock which then existed; and it describes it as a stock “transferable at the Bank of England, commonly called 4 per cent. bank annuities.” The only stock then transferable at the Bank of England, which was commonly called 4 per cent. bank annuities, was the stock which has been since reduced to 3 1-2 per cents. The present 4 per cents. had no existence and no appellation at the time when the testator made his will. The trust may also be considered as an inchoate trust, remaining unexecuted at the time when the 5 G. 4, c. 11, was passed; and if so, it will come within the operation of the twentieth section.

*Mr. Lynch, in reply.*

The wills spoken of in the twentieth section of the 5 G. 4, c. 11, are wills of testators then dead, which were operative instruments, and had created trusts affecting the stock about to be reduced, but which had not been executed. The will of Lord Coventry did not, until his death, create any trust which could affect any species of stock whatsoever.

**THE MASTER OF THE ROLLS:**—Upon the second question, I am of opinion, that the testator's son John, is under the will entitled to a sum of 20,000. stock in the 4 per cent. bank annuities now existing. \*This is not, like the [\*326] case of Lady Sophia, a case of contract. The will speaks only at the death of the testator; and the plain intention is to provide for the son John an income of 800*l.* a year, by the purchase at the testator's death of 20,000*l.* in 4 per cent. bank annuities. The 3 1-2 per cent. bank annuities would not sufficiently answer his clear intention, nor the description in the will.

If his intention could be confined to the 4 per cent. bank annuities existing at the date of the will, it might be argued that



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the legacy was altogether adeemed, inasmuch as there is now no such stock.

The trusts of the first mentioned sum of 20,000*l.* 4 per cent. bank annuities, which the trustees were directed to purchase, were declared in the following words: "I direct that the said sum of 20,000*l.* 4 per cent. bank annuities, when so purchased, shall be transferred into the names of the trustees for the time being of this my will, and that they do and shall stand and be possessed of or interested in one moiety or half part thereof, in trust for my said daughter Lady Barbara Coventry, and the same shall become and be an interest vested in, and shall be transferred or assigned to my said daughter Lady Barbara Coventry, when and as soon as she shall attain the age of twenty-five years, or be married under that age with the consent of my said wife during her life, and after her decease, then of the trustee or trustees for the time being of this my will, which shall first happen; and during such time as my said daughter Lady Barbara Coventry shall be under the age of twenty-five years and unmarried, I direct that my said trustees or trustee do and shall pay and apply one moiety or equal half part of the dividends, [\*327] interest, \*and annual produce of the said 10,000*l.* 4 per cent. bank annuities unto my said wife for and towards the maintenance and education of my said daughter, and do and shall pay and apply the other moiety or equal half part of such last mentioned dividends, interest and annual produce unto my said daughter for clothing and for such other articles of dress and necessities as she shall or may require; and in case my said wife shall die before my said daughter shall attain the age of twenty-five years, or be married with such consent as aforesaid, then I direct that my said trustees or the trustee for the time being of this my will, do and shall pay the whole of the dividends, interest and annual produce of her said portion unto my said daughter to and for her own use and benefit: but if my said daughter shall die under the age of twenty-five years, and unmarried, then I direct that the said sum of 10,000*l.* 4 per cent. bank annuities hereby bequeathed to or in trust for her, shall fall

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into and constitute part of the residue of my personal estate: provided always, that if my said daughter shall die unmarried before she shall attain the age of twenty-five years without such consent as aforesaid, then I do hereby declare my will to be, that the several trusts by this my will declared, respecting the said 10,000*l.* 4 per cent. bank annuities, shall be void; and in lieu thereof, I direct that my said trustees, or the survivor of them, or the executors or administrators of such survivor, do and shall (after such marriage shall be had and solemnized) stand and be possessed of and interested in the capital of the said bank annuities, upon trust that they do and shall receive the interest, dividends and yearly produce of the same from time to time during the life of my said daughter, and do and shall pay, apply and dispose of the same to such person or persons, for such purposes, and in such manner as she, notwithstanding her coverture, \*shall from time to time by any draft, note, order, [\*328] or writing, signed by her, but not by way of anticipation, direct and appoint; and in default of or subject to any such direction and appointment, do and shall pay such interest, dividends and annual produce into the proper hands of my said daughter for her own sole and separate use and benefit, exclusive of her then present or any future husband, who is not to intermeddle therewith, nor is the same to be subject or liable to his debts, engagements or control: and my will is, that any draft, note, order, or receipt in writing, signed by my said daughter, shall, notwithstanding her coverture, be a sufficient discharge for so much money, as in any such draft, note, order or receipt shall be acknowledged to be received, to the persons or person paying the same; and from and after the decease of my said daughter, then upon further trust, that my said trustees, or the survivor of them, or the executors, administrators and assigns of such survivor, do and shall stand and be possessed of and interested in the said sum of 10,000*l.* 4 per cent. bank annuities, and all dividends, if any, which shall have accrued thereon respectively after the decease of my said daughter, in trust for all and every the child or children of my said daughter, to be divided between them in equal shares and proportions, if more than one,

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and if but one such child, in trust for such one child ; the shares of sons to be transferred and paid to them at their respective ages of twenty-one years, and the shares of daughters to be paid to them at that time, or day or respective days of marriage, which shall first happen : and it is my will, that if any of the children of my said daughter, being a son or sons, shall die under the age of twenty-one years, or, being a daughter or daughters, shall die under that age and unmarried, the shares or share of such children or child so dying shall go over, and be paid [\*329] and divided \*amongst the surviving children, in equal shares and proportions, if more than one, and if but one child, then to such one child, and shall be payable in the same manner and be transferable at the same times as I have hereinbefore mentioned with respect to the original provision hereby made for such children respectively : and it is my further will, and I do direct that in case my said daughter shall be married without such consent as aforesaid, and shall leave any children or an only child at the time of her death, my said trustee, or the trustees or trustee for the time being of this my will, do and shall, during the minority of such children or child, pay and apply the whole or a sufficient part of the dividends and interest to accrue on the shares or share of such children or child in and towards the maintenance and education of such children or child respectively, and do and shall, when and so often as the whole of such interest, dividends and annual produce shall not be so applied as aforesaid, lay out and invest the same in the purchase of like bank annuities, and add the interest thereof from time to time to the principal by way of accumulation (such accumulation to be for the benefit of such child or children, and to be transferred and become vested interests at the same age or ages, and to be liable to the same chance of survivorship as hereinbefore declared respecting the principal of such bank annuities) : provided always, and my will is, that notwithstanding the trusts aforesaid, it shall be lawful for my said trustees, or the survivor, or the executors, administrators and assigns of such survivor, after the decease of my said daughter (if they or he shall think fit, but not otherwise), at any time or times during the minority

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of any child or children presumptively entitled to any shares or share of and in the portion hereby provided for my said daughter (being a son or sons), to call in any part of the capital out of which the share or \*shares of any such son or sons shall [\*330] be presumptively payable, but not exceeding in the whole for each and any such son one half of his presumptive portion at the time, and to apply the moneys so to be called in for placing any such son or sons in any profession or employment, or for his or their instruction therein, or otherwise for his or their advancement in the world, notwithstanding his or their portion or portions shall not have then become payable: and my will further is, that in case all the children of my said daughter shall die without having acquired a vested interest or vested interests in the capital of the said bank annuities, then and in such case I direct that the same shall sink into and form part of the general residue of my said personal estate, and be applied and disposed of accordingly. And as to, for and concerning the sum of 10,000*l.* 4 per cent. bank annuities (the remaining part of the said sum of 20,000*l.* like annuities), hereinbefore directed to be raised out of my said personal estate, upon trust that my said trustees, or the survivor of them, or the executors, administrators or assigns of such survivor, do and shall stand and be possessed of and interested in the same, and of and in the dividends, interest and annual produce from time to time to arise therefrom in trust for my said daughter Lady Sophia Coventry and her issue, the same to become an interest vested in and to be assigned and transferred to her and her issue at such or the like ages or times, in such or the like shares and proportions, and in such or the like events, and to be subject to such or the like trusts, provisos and declarations as I have hereinbefore expressed and declared of and concerning the like portion hereby provided for my said daughter Lady Barbara Coventry and her issue." The testator, in a subsequent clause, gave the residue of his personal estate in trust for his children (except \*his son Lord Deerhurst and [\*331] his son John), and their issue, in manner therein mentioned. Then came the following proviso: "Provided, and I do hereby further direct, that whatever sum and sums of money I

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have already paid or advanced, or may hereafter pay or advance to or for the use of any of my children in my lifetime, for which I have already taken or shall hereafter take any acknowledgment in writing, shall be brought into hotchpot before any division shall be made of my said residuary estate and effects, or otherwise the same shall be received, taken, or allowed as part of the share or provision of my said residuary estate and effects, to which the child or children, to or for whose use or benefit such advance or payment has been or shall be made,<sup>(a)</sup> unless I shall by some codicil hereto, or other writing under my hand hereafter, give any directions to the contrary." After various other directions, the will proceeded as follows: "And I do hereby further declare my will to be, that the legacies and benefits hereinbefore bequeathed by me to or in favor of my said children, or any of them, shall not be in satisfaction for, but in addition to, any portion or provision to which they are or shall be entitled under any articles or settlement already executed by me in their favor, other than and except such sums as are hereinbefore directed to be brought into hotchpot as aforesaid."

On the 20th July, 1818, the testator's daughter, Lady Barbara, intermarried with Mr. Crawford, without her father's consent. Upon this, Lord Coventry, by a codicil dated the 25th day of July, 1818, revoked the legacy of 10,000*l.* four per cent. bank annuities, and all other benefits given by his will to [\*332] Lady Barbara and \*her issue, and he thereby gave to her, in lieu of his former bequest, a sum of 5,000*l.* four per cent. bank annuities, for her life only. Afterwards, by a deed bearing date the 9th day of July, 1825, the testator covenanted to pay a sum of 10,000*l.* sterling to trustees, upon certain trusts thereby declared for the benefit of Lady Barbara and her children; and by a codicil dated the 11th day of July, 1825, referring to the deed of the 9th of July, he declared the 10,000*l.* to be in satisfaction of all legacies or sums of money given to his said daughter, or in trust for her, by his will, or any codicil thereto. In pursuance of his covenant, Lord Coventry, on the

(a) The sentence is imperfect; it is printed as it was in the briefs.

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1st of August, 1825, laid out 10,000*l.* in the purchase of three per cent. bank annuities, in the names of the trustees of the settlement made in the preceding July.

Lady Barbara and Lady Sophia were the two youngest children of the Earl of Coventry; and he had seven other elder children, each of whom, upon the death of Thomas Coventry, became entitled under the will of Thomas to legacies of 10,000*l.* four per cent bank annuities. Lady Sophia and Lady Barbara were not born at the time of Thomas' death, and took nothing under his will. In 1811, Lady Augusta, one of the seven elder children, intermarried with Sir Willoughby Cotton. Shortly afterwards the Earl of Coventry advanced 2,200*l.* for the purpose of a commission for his son in law, and 360*l.* for the purchase of a lease of a house; and on that occasion he took from Lady Augusta an acknowledgment, signed by her, in the following words: "I acknowledge to have received from my father, the Earl of Coventry, the sum of 2,200*l.*, advanced to me at my request, towards the purchase of a commission in the army for my husband, Willoughby Cotton; also 360*l.* towards purchasing the lease of a house in Cadogan place, which sums make together 2,560*l.*, but which is not to be claimed \*from [\*333] me or my husband, otherwise than by a deduction from any property which may be left to or in trust for me or him by the will of my father."

Under these several circumstances, the third question in the cause was, whether Lady Sophia Gresley was entitled, not only to the sum of 10,000*l.* four per cent. bank annuities, according to the condition of the bond given by her father upon her marriage, but also to the 10,000*l.* four per cent. bank annuities provided for her by the will.

Mr. *Bickersteth* and Mr. *James Russell* argued that, according to the general doctrine on the subject of double provisions or portions, the bond was a satisfaction of the legacy; and that the testator throughout the will manifested a plain intention to give

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equal benefits to his daughters. His reason for giving legacies of 10,000*l.* four per cent. bank annuities to the two youngest daughters was, that each of the elder children had an equal legacy under the will of Thomas Coventry. The very motive of the bounty was equality. But if Lady Sophia was allowed to take the legacy in addition to the sum secured to her by the bond, the equality would be destroyed, and she would, to the extent of the legacy, derive more from her father than any of her sisters did. They cited *Hartopp v. Hartopp*,<sup>(a)</sup> *Trimmer v. Bayne*,<sup>(b)</sup> *Chave v. Farrant*,<sup>(c)</sup> *Ex parte Pye*,<sup>(d)</sup> and they referred to *Weall v. Rice*,<sup>(e)</sup> *Booker v. Allen*,<sup>(g)</sup> and *Lloyd v. Harvey*,<sup>(h)</sup> as cases in which all the principal authorities had been reviewed, and the rule finally established.

[\*334] \*It was true that the limitations of the settlement did not correspond exactly with the trusts on which the legacy was given. Sir Roger Gresley took an interest under the settlement, but took nothing under the will: Lady Sophia took a greater beneficial interest under the will than under the settlement; and the limitations to the children in the settlement and the will differed in various minute particulars, although the precise nature of the limitations in the settlement did not appear upon the pleadings. But such differences as these did not exclude the application of the rule against double portions; both provisions being substantially for the benefit of the daughter and her family.

Mr. Tinney, and Mr. Spence, *contra*.

Besides the differences between the trusts of the settlement and the trusts on which the legacy is given, it is to be observed, that the legacy is of greater amount than the provision made by the bond; for according to the judgment of the court on the

(a) 17 Ves. 184.

(b) 7 Ves. 508.

(c) 18 Ves. 8.

(d) 18 Ves. 140.

(e) p. 251, *supra*.

(g) p. 270, *supra*.

(h) p. 310, *supra*.

first two questions, the legacy would entitle the legatee to 10,000*l.* four per cent. bank annuities, while the bond will be satisfied by a like sum of 3 1-2 per cent. stock. From the conduct of the testator to his other daughters, it may fairly be presumed, that he intended Lady Sophia to take both provisions. When Lady Augusta married, he advanced for her benefit a sum of 2,560*l.*, and he took the precaution of having an acknowledgment signed by her, for the purpose of showing that the advancement was to be a satisfaction, *pro tanto*, of what she might be entitled to under his will. When he made a settlement of 10,000*l.* on Lady Barbara and her children, he was at the trouble of making a codicil, for the sole purpose of declaring that the settlement was a satisfaction of any legacy he had given to her, though the only legacy \*at that time [\*335] bequeathed to her was a life interest in 5,000*l.* four per cent stock. If the testator had meant the settlement on Lady Sophia to be a revocation of the legacy given to her, would he not have taken the same course as in the case of Lady Barbara, and declared his purpose by a codicil? The presumption thus arising, that the testator did not intend the settlement to be a satisfaction and ademption of the legacy, was greatly increased by the express declaration contained in his will, that, with the exception of the sums expressly directed to be brought into hotchpot, the legacies bequeathed to any of his children were to be, not in satisfaction for, but in addition to, any portion or provision to which they were or should be entitled under any articles or settlement then already executed by him.

THE MASTER OF THE ROLLS:—Upon the third question I am of opinion, that the legacy of 10,000*l.* 4 per cent bank annuities to Lady Sophia is satisfied by the bond given by the testator on her marriage, and that she is not entitled to both provisions. The inferences drawn from the testator's conduct with respect to Lady Augusta and Lady Barbara, do not afford the conclusions contended for as to the testator's intention; and the differences between the limitations of the settlement and the will are not such as to prevent the application of the rule as to double portions.



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[\*336]

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ROLLA.—1831: 28th January.

A testatrix gave a share of her residuary estate to the children of Mary Gladman, deceased. Mary Gladman left two children, one legitimate, the other illegitimate. Evidence was admitted to prove that the illegitimate child had acquired the reputation of being the child of Mary Gladman; that the testatrix well knew that fact, and that Mary Gladman left only those two children.

THE testatrix, Elizabeth Merricks, the wife of James Merricks, being empowered by her marriage settlement to dispose of her estate notwithstanding her coverture, did, by her will, give the whole of her estate, both real and personal, to her husband for his life, and after his death she gave parts thereof to different persons; and as to her residuary estate she directed her trustees and executors "to divide, share and pay the same equally to, between and amongst Anne Maria Hall, widow, now or lately residing at Carter's Corner in the parish of Hellinsly, the adopted daughter of Thomas Colbran, heretofore of Hailsham, yeoman, deceased, the before-named and described Sarah Kennet and Thomas Martin respectively, notwithstanding the bequest hereinbefore made to them, and over and above the same respectively; and also to and between and amongst all and every the legitimate children of my relations who (those who are relatives) were, are or may be in consanguinity to me of the degree of first cousins, either paternally or maternally (except the before-named Elizabeth Stephens, whom I exclude from receiving any part or share of the same); and in this last bequest I include William Freeman, the son of the late Charles Freeman of the Cliffe aforesaid, grocer, Elizabeth Merricks (deceased), the grandson of the before named Henry Freeman and Mary his wife, intending that he the said William Freeman shall have and take such part, share and interest therein, as his father the said Charles Freeman deceased would have been entitled to if living, under this my will in this particular respect; and in

[\*337] case any of the parties, or any of the children of \*my

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said relatives, to whom I have given a distributive share of the residue and remainder of my said real and personal estate, or of any other description of estates not hereinbefore disposed of, and amongst whom I include the children of the late William Martin of Hailsham aforesaid, shopkeeper and farmer, deceased; also the children of the late Elizabeth Hastings of Hailsham aforesaid, deceased (before Elizabeth Martin); also the children of the late Mary Gladman, of East Dean in the said county of Sussex, deceased (before Mary Blackman, and likewise the children of such of them my said relatives last before described, as shall happen to die in my lifetime or in the lifetime of my said husband, the share of him, her or them so dying, shall go and be payable, and paid equally to and amongst the children of such deceased person or persons)."

The testatrix died in the year 1827.

At the time of making her will, there were living two children of Mary Gladman, who was then dead, and was described in the will as the late Mary Gladman: one of them, the defendant Charlotte Shelley, was an illegitimate child, born before the marriage of her mother with John Gladman, and the other, a legitimate child, born after the mother's marriage.

Mary Gladman was the daughter of Joseph and Mary Blackman, which Mary Blackman was a first cousin of the testatrix.

The husband of the testatrix had died: and the question in the cause was whether the defendant Charlotte Shelley was entitled to share in the testatrix's residuary estate as one of the children of the late Mary Gladman.

\*It was proved in the cause, that Charlotte Shelley [\*388] was an illegitimate child of Mary Gladman, and born in the year 1796; that Mary Gladman was acquainted with the testatrix before the birth of the child; that, prior to her marriage, and soon after the birth of the defendant Charlotte Shelley,

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she went to live in the house of the testatrix, and that the testatrix was well aware that Mary Gladman had such illegitimate child; that the child, when quite an infant, and during the residence of the mother with the testatrix, was frequently brought to the house of the testatrix, and treated affectionately by the testatrix; that Mary Gladman being uneasy at her separation from her child, the testatrix proposed that the child should reside with some person near to her, and offered to pay the extra expense which would thereby be occasioned; that the defendant Charlotte Shelley went by the name of Blackman, was put out to nurse for the first year after her birth, and afterwards resided with the father and mother of Mary Gladman until the marriage of Mary Gladman, and from that time she resided with John Gladman and Mary Gladman until the death of Mary Gladman; that Mary Gladman, after her marriage and until her death, resided with her husband at the distance of nine or ten miles from the testatrix, and continued to be in the habit of going to the house of the testatrix until she died; that she frequently took her two children with her to visit the testatrix, and that the testatrix well knew that Mary Gladman had only one child after her marriage.

Mr. *Bickersteth*, for the plaintiffs.

Mr. *Pemberton* and Mr. *Wigram*, for Charlotte Shelley.

Mary Gladman had only one legitimate child. As she was dead at the date of the will, there were not persons, and [\*389] \*there never could by any possibility be persons, who would answer the description of "children of Mary Gladman," if that description was to be confined to legitimate children; and these facts were well known to the testatrix. It therefore becomes necessary to look to circumstances *dehors* the will, (a) in order to see, whether there were persons who would come within the description, taken in a more extended sense,

(a) See Mr. Wigram's Examination of the Rules of Law respecting the admission of extrinsic evidence in aid of the interpretation of wills, pp. 32, 33.

and whom the testatrix meant to denote by the words she used : *Woodhouselee v. Dalrymple*,<sup>(a)</sup> Here the evidence establishes a state of circumstances, from which there arises a necessary implication that the testatrix included Charlotte Shelley as one of the children of Mary Gladman : "necessary implication, meaning," as Lord Eldon says in *Wilkinson v. Adam*,<sup>(b)</sup> "not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed."

Mr. Bacon for the representatives of James Gladman, the only legitimate child of Mary Gladman.

The only point on which Lord Eldon, in *Wilkinson v. Adam*, received evidence *dehors* the will, was to establish the fact that there were persons, not legitimate children, who had gained the reputation of children : "If my judgment upon this case," says his Lordship,<sup>(c)</sup> "is supposed to rest upon any evidence out of the will, except that which establishes the fact, that there were individuals who had gained by reputation, the name and character of his children, that conclusion is drawn \*without sufficient attention to the grounds on which [\*340] the judgment is formed ; my opinion being, that, taking the fact as established, that there were children who had gained the reputation of being his children, it does necessarily appear on the will itself, that he intended those children." Now assume that Mary Gladman had only one legitimate child, and that she had also an illegitimate child ; that state of things will not entitle Charlotte Shelley to participate in the bequest along with the legitimate child of Mary Gladman. In *Hart v. Durand*,<sup>(d)</sup> testator gave a legacy to "every of the sons and daughters of his late cousin : " his cousin left one legitimate daughter, and one son and one daughter illegitimate. It was held that the latter were not entitled under the will, and that evidence of the intention of the testator was not admissable. In *Swaine v. Kennerley*,<sup>(e)</sup>

(a) 2 Mer. 419.

(c) 1 Ves. & B. 462.

(e) 1 Ves. & B. 469.

(b) 1 Ves. & B. 466.

(d) 3 Anst. 684.

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the bequest was to "all and every the child and children of the testator's late son, Thomas Swaine, deceased, equally to be divided between or amongst them." The son Thomas left three children, of whom one was legitimate, but the other two, Thomas and John Swaine, were born before marriage. Lord Eldon held that the legitimate son alone was entitled, and assigned as the reason of his judgment, "that the will itself does not prove that the testator meant an illegitimate child;" "The will," he said, "must prove that illegitimate children are intended; and extrinsic evidence can be received only for the purpose of collecting who had acquired the reputation of being children of the person named in the will." There is here a legitimate child; and the circumstance that there is only one legitimate child, will not enable an illegitimate child to take along with him under the general description of children.

[\*341] \*Mr. *Pemberton*, in reply, said that the rule that children and illegitimate children could not take together under the general description of children, applied only to cases in which the word was used to describe a class, and not where (as in the case before the court), the word clearly described particular individuals: that if, in *Wilkinson v. Adam*, the testator had survived his wife, and married Ann Lewis, the legitimate children of that marriage would have taken jointly with the illegitimate children, in whose favor the cause was decided: that *Swaine v. Kennerley* was distinguishable from the case before the court, because it did not appear that, in that case, the facts were known to the testator; that the same remark applied to *Hart v. Durand*, for, as the testator there spoke of sons, when there was no legitimate son, and only one illegitimate son, the will showed that he was not acquainted with the state of J. Durand's family; and besides, the evidence in that case was tendered to prove the testator's intention to comprehend illegitimate children, and not to establish facts, from which, taken in connection with the language of the will, that intention would necessarily be inferred.

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Gill v. Shelley.

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THE MASTER OF THE ROLLS:—The question in cases of this sort is a question of intention. *Prima facie*, the term children is intended to mean legitimate children; and if there are legitimate children, or if it be possible that there should be legitimate children of the person named, no illegitimate child can take under the description of children. If, in this case, there had been no legitimate child of Mary Gladman at the time of making the will, and there had been two illegitimate children, inasmuch as the death of Mary Gladman made it impossible that there should be any future legitimate child, there can be no doubt \*that evidence would have been admissible to [\*342] prove the fact; and the two children, who had acquired the reputation of being the children of Mary Gladman, would have taken under the description of her children by force of the clear intention of the testatrix. If, in this case, the gift had been “to the two children” of Mary Gladman, deceased, then, inasmuch as the death of Mary Gladman had made it impossible that there should be two legitimate children, ought not evidence to be admissible of the facts from which it was demonstrated that the testatrix meant to include the illegitimate child who had acquired the reputation of being the child of Mary Gladman? And is there, as to this point, any sound and rational distinction between the expression “the children,” which necessarily describes more than one child, and the expression “the two children?”

Considering, then, that “children” is an ambiguous term, which may mean legitimate child or illegitimate children who have acquired the reputation of being children; and assuming that, if there are, or by any possibility may be, legitimate children to satisfy the expression, no illegitimate child can take together with the legitimate children, although that point is denied by the judges in *Wilkinson v. Adam*—I think the evidence admissible in this case: and the evidence, being admitted, demonstrates that the testatrix did mean to include the defendant, Charlotte Shelley, under the expression of “the children of the late Mary Gladman.”

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Dowling v. Tyrell.

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In the case of *Swaine v. Kennerley*, the expression is, "the child or children of my late son, Thomas Swaine, deceased," which implied a doubt in the mind of the testator whether his late son had more than one child. In *Hart v. Durand*, the expression is, "to every of the sons and daughters of my [\*843] late cousin, J. Durand;" and, \*that cousin having left only one legitimate daughter, and only two illegitimate children, a son and a daughter, the expression in the will manifested that the testator was ignorant of the actual state of Durand's family. Neither of these cases, therefore, demonstrated a clear intention on the part of the testator in favor of the legitimate children.(a)

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DOWLING v. TYRELL.

ROLLS.—1831: 14th February.

Where a legacy is given to a natural child, with direction to apply the interest for his maintenance, the interest is payable from the death of the testator.

IN this case the testator gave a legacy to an infant described in the will as his natural child, with a direction to apply the interest for his maintenance, during his minority.

A question was made, whether the interest was payable on the legacy from the death of the testator, or from the end of the year after his death.

The cases cited were *Raven v. Waite*,(b) *Beckford v. Tbbin*,(c) *Newman v. Bateson*.(d)

THE MASTER OF THE ROLLS ruled that interest was payable from the death of the testator.

(a) See *Bagley v. Mollard*, 1 Russ. & Mylne, 581.

(b) 1 Swans. 533.

(c) 1 Ves. sen. 308.

(d) 3 Swans. 689.

**\*COLLINSON v. PATER.—COLLINSON v. KNIBB. [\*344]****ROLLS.—1831: 14th February.**

A judgment debt due to a testator, which in his lifetime had been reported in a creditor's suit, to be an incumbrance affecting the real estate of the debtor, will not pass by his will to a charitable use, being within the statute of the 9 G. 2. c. 36.

GEORGE KNIBB, by his will, dated the 26th of July, 1826, bequeathed unto the plaintiffs, their executors, administrators and assigns, all his personal estate and effects, upon trust to get in the same, and all such debts as might be owing to him at the time of his decease, and to sell and convert into money all such part or parts of his personal estate as should not at the time of his decease, consist of ready money. He then directed that the trust moneys should be invested on government securities; and that, after paying out of the dividends an annuity of 25*l.* to Elizabeth Knight during her life, his trustees and executors should divide the residue of the interest and dividends equally between four such persons, being the widows of respectable tradesmen, who were at the time of their decease inhabiting and dwelling in the parish of Newport Pagnel, such widows being members of the established Church of England, as the vicar, for the time being, of the parish should, from time to time, nominate and appoint. Upon the death of Elizabeth Knight, the annuity bequeathed to her was to fall into the residue, and be distributed in the same way.

By a codicil, dated the 12th of August, 1826, the testator directed his trustees, after payment of the annuity, to divide the residue of the dividends of the trust funds equally between Ann Pater, Ann Higgins, Susannah Inns, and Hannah Wilson, during the term of their natural lives respectively; and when and as often as any one of the last-mentioned persons should die, to pay the \*share of her so dying to such [\*345] other person, being the widow of a respectable trades-



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Collinson v. Pater.

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man, who was at the time of his decease inhabiting and dwelling in the town of Newport Pagnel, such widow being a member of the established Church of England, as the vicar, for the time being, of the said parish should, from time to time, nominate and appoint, during the term of her natural life: and when and as often as any one or more of the said four widows, so to be nominated and appointed as aforesaid, should die, to pay the share or shares of her or them so dying to such other person or persons answering the description aforesaid, as the said vicar for the time being should nominate and appoint, during the term of her or their life or lives respectively.

The testator, in his lifetime, entered up a judgment against a person of the name of Mansell for the principal and interest due on a bond conditioned for the payment of 2,000*l*. Mansell having died, and a suit having been instituted for the administration of his estate, Knibb proved his debt in that suit; and the Master, in his report made in Knibb's lifetime, found the judgment to be a charge on Mansell's real estates. Mansell's personal estate was insufficient for the payment of his debts; and the judgment debt was paid to Knibb's executors out of the proceeds of the sale of Mansell's real estates.

The question was, whether, in so far as the residue was composed of Mansell's debt, the ultimate gift to charitable purposes was not void, as coming within the Mortmain Act, 9 G. 2, c. 36.

Mr. *Wray* for the Attorney-General.

Mr. *Tinney* and Mr. *Ching* for one set of defendants.

[\*346] \*Mr. *Bickersteth* and Mr. *Teed* for other defendants.

In support of the validity of the gift, it was argued that the debt due from Mansell could not be considered as an "estate or interest in or a charge or incumbrance affecting any land:" that the words of the statute had reference only to charges and in-

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Collinson v. Pater.

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cumbrances, on certain specified lands; and that the judgment gave no estate in the land, but merely a right to sue out an *elegit*.

On the other hand, it was contended that a judgment debt was, according to the common import of language, a charge affecting land: it gave the judgment creditor a lien on the lands and secured to him a priority over any estate created by a subsequent conveyance from the debtor. In the present case, the Master had actually found this debt to be a charge on Mansell's real estate; and to such an extent was it an interest in land at the time of Knibb's death, that it was subsequently, by means of the agency of the Court of Chancery, paid out of the proceeds of Mansell's real estate.

THE MASTER OF THE ROLLS:—The testator, George Knibb, in his lifetime had a judgment entered up against one Mansell, for the sum of 2,315*l.* 2*s.* 11*d.* due to him on Mansell's bond. After the death of the debtor, a creditor's suit was instituted for the administration of his estate; and it being in that suit referred to the Master to take an account of the mortgages and other incumbrances affecting the real estate of the debtor, that judgment debt was proved under the decree, and the Master, in his report made in the lifetime of the testator, stated the judgment debt as one of the incumbrances affecting the real estate of Mansell. The testator, by his will, gave his residuary estate to certain charitable uses; and the question in the \*cause [\*347] is, whether this judgment debt is within the statute of the 9 G. 2, c. 36.

I am of opinion that it is within the statute, and will not pass to charitable uses.

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 Richards v. Davies.
 

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CATHERINE RICHARDS, WIFE OF DAVID RICHARDS, BY HER NEXT FRIEND, AND JOHN JOHN v. THOMAS DAVIES, JOHN DAVIES, AND DAVID RICHARDS.

ROLLS.—1831: 15th February.

The court will direct an account of past partnership transactions, though the bill does not pray a dissolution; but will make no order for carrying on partnership concerns, unless with a view to a dissolution.

BY articles of agreement, dated the 19th of January, 1799, a partnership was constituted for a long term of years, which had not yet expired. Under these articles the plaintiffs were interested in the partnership; but they had not interfered actively in the business, which was managed by the defendant Thomas Davies. The plaintiffs alleged that proper accounts of the partnership dealings had not been rendered to them from time to time, and that they were excluded from the means of ascertaining the state of the partnership affairs. They, therefore, filed their bill in the Court of Great Sessions for the counties of Carmarthen, Pembroke, and Cardigan, praying that an account of the partnership dealings might be taken, and that the partnership might be conducted and carried on during the residue of the term, for which the same was established, in conformity to the articles of \*agreement of the 19th of January, 1769; that Thomas Davies might be decreed, from time to time, to produce to the plaintiffs, and to permit them to have access to all the books of the partnership; and that if necessary, a proper person might be appointed to manage and conduct the partnership trade, and to receive the debts due and to become due to the same.

The answer suggested that the accounts of all dealings prior to the filing of the bill had been settled; but there was no evidence of the alleged settlements.

The cause came on to be heard in the Court of Great Sessions, shortly before the Act abolishing the Welch judicature came into

operation; and the suit was dismissed with costs, on the ground that a partner could not file a bill to have the accounts of a partnership taken, unless he prayed the dissolution of the partnership.

The cause was removed by the plaintiffs into the Court of Chancery, pursuant to the provisions of 11 G. 4 & 1 W. 4, c. 70.; and a petition of rehearing was presented, which now came on to be argued.

Mr. Bickersteth and Mr. John Wilson, for the plaintiffs.

It may be true that the court will not interfere to manage a partnership by a receiver, except in the case of a dissolution, and with a view to winding up the concern; but to say that one partner shall not have an account against another, unless he will consent that the partnership shall be at an end, is a very different proposition, and not one warranted by authority.

While the \*old action of account was in use, one part- [\*349] ner might have had the benefit of it against another, without putting an end to the partnership. "If two joint merchants," says Lord Coke,(a) "occupy their stocks, goods and merchandizes in common to their common profit, one of them naming himself a merchant shall have an account against the other naming him a merchant, and shall charge him as *receptor denariorum ipsius B. ex quacunque causa et contractu ad communem utilitatem ipsorum A. et B. provenien'*, sicut per legem mercatoriam rationabiliter monstrare poterit." The action of account has now fallen into desuetude, and a partner is without remedy at law: but the bill in equity has been substituted for the action of account; and it would be extraordinary if a bill for an account could not be maintained where in former times an action of account might have been brought. In *Harrison v. Armitage*,(b) it was expressly held that one partner might file a bill against his co-partner for an account, though he did not pray a dissolution; and it was there said that *Forman v. Honfray*(c) applied

(a) Co. Litt. 172, a.

(b) 4 Mad. 143.

(c) 2 Ves. & B. 329.

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Richards v. Daviea.

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only to a case of interim management, which would not be granted, unless the bill prayed a dissolution of the partnership.(a)

If the rule were otherwise, the greatest injustice might [\*350] \*be done without the possibility of remedy. A trader

admits his clerk into a valuable business, with a view of securing a large proportion of the profits to his own widow and children after his decease; the person thus admitted gets into management; the original owner dies; the business is carried on for a short time; the survivor, knowing the widow and children could not carry it on themselves, refuses to account: if he is not made to account, he is a great gainer; if those, whom he has wronged, are induced to pray for a dissolution, he is a still greater gainer, being enabled by that means to appropriate to himself the whole benefit of the business. What can be more extravagant than to say, that under such circumstances, the party injured shall not have an account, unless he releases the party who has wronged him, from the obligations of a partner in time to come?

Mr. Pemberton, *contra*.

*Forman v. Homfray* was not a case of interim management: it was a motion to have money paid into court; and Lord Eldon refused to make the order, on the ground that a partner could have no remedy against his co-partner on a bill not praying relief. He there says that "he did not recollect an instance of a bill, filed by one partner against the other, praying an account merely, and not a dissolution;" and he observed that, "if a partner can come here for an account merely, pending that partnership, there seems to be nothing to prevent his coming annually."

(a) In *Knowles v. Haughton*, 11 Ves. 168, the bill prayed an account without praying a dissolution; and the decree directed the accounts to be taken. In *Chapple v. Cadell*, Jac. 537, the bill did not pray a dissolution; yet a decree was pronounced by Sir William Grant, declaring the rights of the partners, and directing accounts of the partnership dealings to be taken; and that decree was affirmed by Lord Eldon. See however, *Marshall v. Colman*, 2 J. & W. 266. *Loscombe v. Russell*, 4 Sim. 8.

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Richards v. Davies.

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*Waters v. Taylor*(a) is to the same effect; and in the case of *Kinder v. Taylor* (mentioned in Gow's *Treatise on Partnership*)(b) the same doctrine is recognized. Here the bill, far from contemplating a dissolution, prays that the partnership may be \*carried on during the residue of the term, and the [\*351] court is called upon to interfere in carrying it on, so as to secure to the plaintiffs what they conceive they have a right to.

THE MASTER OF THE ROLLS:—A bill was filed in the Court of Great Sessions of the several counties of Carmarthen, Pembroke and Cardigan, by one partner against another, praying for an account of what was due to the plaintiffs in respect of the past partnership transactions, and that the partnership might be carried on and conducted under the decree of the court.

At the hearing of the cause in Wales, the bill was dismissed with costs.

The plaintiffs, under the statute of 11 G. 4 and 1 W. 4, c. 70, presented a petition of rehearing.

In support of the judgment in the court below it is contended, that a court of equity cannot entertain a suit for a partnership account, unless the bill seeks a dissolution of partnership.

The plaintiff, for moneys due to him on a partnership account, has no relief at law, and if a court of equity refuses him relief, he is wholly without remedy. This would be contrary to the plain principles of justice, and cannot be the doctrine of equity.

It is objected, that if such a suit be entertained, the defendant may be vexed by a new bill, whenever new profits accrue; but what right has the defendant to complain of such new bill, if he repeats the injustice of withholding what is due to the plaintiff?

(a) 15 Ves. 10.

(b) Stated also in Collyer on Partnership, Appendix No. 11.

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Macartney v. Graham.

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[\*352] Would not \*the same objection lie in a suit for tithes, which accrue *de anno in annum*?

I must, therefore, decree the account of the past partnership transactions; but I can make no order for carrying on the partnership concerns, unless with a view to a dissolution.

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The decree reversed the order of dismissal, and directed the defendants to pay the plaintiffs the costs which had been paid on the dismissal of the suit; and it referred it to one of the Masters to take an account of the dealings and transactions of the partnership in the pleadings mentioned, from its commencement up to the date of the report; in taking which account the Master was not to disturb any stated or settled accounts, which he should find had been come to by the partners. Reg. Lib. 1830, B. fol. 1831-2.

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[\*353]

\*MACARTNEY v. GRAHAM.

ROLLS.—1831: 18th February.

In a suit to recover the amount of a lost bill of exchange, the loss of the bill being proved at the hearing, the defendant, if he disputes the sufficiency of an indemnity which has been offered to him, and the Master finds in favor of the indemnity, will be ordered to pay the costs subsequent to the original hearing.

THE suit was instituted to recover payment of a bill of exchange which had been lost, and the plaintiffs had offered an indemnity to the defendant, before the institution of the suit. The loss of the bill was proved; and on the hearing, the Vice-Chancellor referred it to the Master to inquire whether the indemnity, which had been tendered, was a proper indemnity, but gave no costs up to the hearing.

The Master found that the indemnity which had been tendered was a proper indemnity; and the question now was, as to the costs subsequent to the original decree.

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 Peake v. Gibbon.
 

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Mr. *Pemberton* and Mr. *Koe*, for the plaintiffs.

Mr. *Cooper*, for the defendant.

THE MASTER OF THE ROLLS:—The defendant thought fit to dispute the fact, whether the indemnity, which, had been offered to him, was a proper indemnity; and the Master has found that it was a proper indemnity. It is plain, therefore, that as the costs subsequent to the original hearing have been occasioned by the defendant refusing, without sufficient reason, to be satisfied with the indemnity which was offered to him; he ought to be charged with such costs.

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\*PEAKE v. GIBBON.

[\*354]

ROLLS.—1831: 18th February.

In a foreclosure suit, to which the provisional assignee of the Insolvent Debtors' Court is made a party, as representing the owner of the equity of redemption, the costs of the provisional assignee will be ordered to be paid by the plaintiff, who will add them, along with his own costs, to the sum due on the mortgage.

THE bill was filed by a mortgagee to foreclose the heir at law of the mortgagor. The heir took the benefit of the Insolvent Act, and the provisional assignee was made a defendant by supplemental bill.

At the hearing, Mr. *Teed* appeared for the provisional assignee, and asked that his costs might be provided for. The proper course, he said, would be for the plaintiff to pay them, and to add them, along with his own costs of suit, to his security.

Mr. *Pemberton* and Mr. *Wakefield*, for the plaintiff, contended, that the provisional assignee could not be in a better situation than the insolvent whom he represented, and must take his chance of getting his costs out of the assets of the insolvent. It



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 Major v. Lansley.
 

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would be a great hardship on mortgagees, holding probably a security already insufficient, if they were to be burdened with the costs of the provisional assignee, when the mortgagor became insolvent; and it would be a great encouragement to the provisional assignee to appear, when in fact he ought not to appear, there being no purpose to be served by his appearance, except simply that he might ask for his costs.

THE MASTER OF THE ROLLS :—The provisional assignee is a necessary party to the suit, as representing the interest of the mortgagor; and being a public officer, who does not take upon himself by any act of his own to represent the insolvent, but on whom the duty of representing the estate is thrown [\*355] \*for public convenience, it would be a great hardship, if the rule, which applies to assignees in bankruptcy, were extended to him. He must have his costs from the plaintiff, who will add them to the costs which he is entitled to be paid, before he can be redeemed.

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 MAJOR v. LANSLEY.

ROLLS.—1831: 24th, 27th and 31st January, 23d Feb.

A married woman, to whom a rent charge for life in reversion is devised to her separate use, without the intervention of trustees, joins with her husband in assigning it for a valuable consideration: she is bound by that assignment after the death of her husband.

WILLIAM NEALE, by his will, dated the 28th of March, 1821, devised certain real estates to his brother, James Neale, for life; and, after his decease, to his niece, Louisa Reding, her heirs and assigns, forever; charged, nevertheless, after the decease of James Neale with one annuity, or clear yearly rent of 50*l.*, payable half yearly, which he thereby gave to his niece, Martha Lansley, wife of Edward Lansley, during her natural life, for her sole use

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Major v. Lansley.

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and benefit, notwithstanding her coverture, and free from the debts, control or engagements of her said husband, for which her receipt alone was to be a good discharge; and from and after the decease of Martha Lansley, he, the testator, directed that, if Edward Lansley should be then living, the said annuity should be paid to Edward Lansley, and his assigns, during his natural life, by the like half yearly payments. Powers of entry and distress, in case the annuity should be in arrear, were given to Martha Lansley and Edward Lansley successively.

The testator died in November, 1822: James Neale, the brother, on whose decease the annuity became payable, died in January, 1828: and Edward Lansley died in the following August, leaving his wife, Martha, him surviving.

\*By an indenture, dated in October, 1823, and made [\*356] between Edward Lansley and Martha his wife, of the first part, the plaintiff of the second part, Wheeler and Gilbert of the third part, and Rawlins of the fourth part, in consideration of 400*l.*, paid by the plaintiff to Lansley, and which sum, with interest, Lansley covenanted to pay on or before the 4th of April, then next, it was witnessed that Lansley and Martha his wife did grant, bargain, sell and confirm unto Wheeler and Gilbert, their heirs and assigns, the said annuity or yearly rent of 50*l.*, given by the will of William Neale to Martha Lansley, together with all her powers and remedies for recovering and compelling payment thereof, to hold the same to Wheeler and Gilbert, their heirs and assigns, during the life of Martha Lansley, subject to the provisos, declarations, and agreements thereafter expressed: and Edward Lansley, with the privity and approbation of Martha his wife, covenanted with the plaintiff that he, Lansley, and his wife would, as of Trinity Term then last or Michaelmas term then next, levy to Wheeler and Gilbert a fine *sur concesserunt* of the said annuity or yearly rent, which fine was to inure to the use of Wheeler and Gilbert and their heirs during the life of Martha Lansley, subject to the provisos, agreements and declarations thereafter expressed.

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Major v. Lansley.

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By the same indenture, Edward Lansley conveyed to Wheeler and Gilbert, and their heirs, the annuity given to him in reversion, expectant upon the death of his wife. It was further declared and agreed that if Edward Lansley, his heirs, executors, administrators or assigns, should pay to the plaintiff, his executors, administrators or assigns, the sum of 400*l.*, with interest as thereinbefore mentioned, Wheeler and Gilbert should reconvey the said annuity, thereby first granted and confirmed, unto the said Martha Lansley for her sole and separate use, [\*357] \*and in the same manner, and with the same powers as were expressed concerning the same, in the will of William Neale; and reconvey the said annuity or yearly rent and premises, thereby secondly granted, unto Edward Lansley, or his assigns, as he or they should direct.

A power was given to Wheeler and Gilbert, if the principal money and interest was not discharged within six months after payment had been required in writing, to sell the annuities: the moneys arising from the sale were to be applied in satisfying what should be due for the 400*l.* and interest; and the surplus was to be paid to Edward Lansley, and Martha Lansley, their respective executors, administrators or assigns, according to their respective rights and interests.

At the death of Edward Lansley the whole of the principal sum was due, together with an arrear of interest; and the bill was filed to have the equity of redemption foreclosed or the annuities sold.

No fine had been levied.

Mr. *Treslove*, and Mr. *Girdlestone*, senior, for the plaintiff.

Mr. *Girdlestone*, junior, for the defendant Martha Lansley.

The annuity being given without the intervention of trustees, the husband took the legal estate in it during the joint

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Major v. Lansley.

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lives of himself and his wife.(a) At the time when \*the [\*358] security was executed, she had only a reversionary equitable interest. Upon the death of the husband, the legal estate vested in her. The equitable interest, which had previously existed in the contemplation of this court, in order that effect might be given to the direction that the annuity was to be to her separate use, ceased. Upon the legal estate the deed of 1823, had no operation; and there was not now any distinct equitable estate to her separate use, which the deed could charge. A fine would have bound her legal interest; and the husband's covenant to levy a fine showed that the parties were dealing upon the supposition, that without a fine the interest of the wife could not be effectually charged. A fine, however, had not been levied; and as the deed was at law a mere nullity as against the wife, she was now entitled to a legal annuity, which was not subject to any incumbrance or charge. The plaintiff, therefore, was not entitled to any relief against Mrs. Lansley, and the bill ought to be dismissed.

In reply, Mr. *Treslove* insisted that the annuity being given to the separate use of the wife, she was, *qua* the annuity, a *feme sole*: that she was bound by the deed which she had executed; and that that deed bound the annuity at all times, however her interest in it might be afterwards modified or varied.

*Rippon v. Dawding*,(b) *Bramhall v. Hall*,(c) *Wright v. Sir Henry Englefield*,(d) *Wright v. Lord Cadogan*,(e) *Hyde v. Price*,(g) *Compton v. Collinson*,(h) *Sturgis v. Corp*,(i) *Martin v. Mitchell*,(k) were cited.

(a) In *Polyblank v. Hawkins* (1 Doug. 329), it was held, that the husband of a woman tenant in fee, must declare on a *seisin in fee in himself and his wife in right of his wife*, and that if he stated that he was seised in his demesne as of freehold in right of his wife, it would be bad on special demurrer.

(b) Amb. 565.

(g) 3 Ves. 437.

(c) Amb. 467.

(h) 1 H. BL 334.

(d) Amb. 468.

(i) 13 Ves. 190.

(e) 1 Bro. P. C. 486, Toml. ed.

(k) 2 J. & W. 413.

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 Denae v. Hart.
 

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[\*359] \*THE MASTER OF THE ROLLS:—The defendant, being a feme covert entitled for life to her separate use to a reversionary interest in an annuity charged on real estate, joined with her husband in assigning the annuity by deed to the plaintiff. The husband having died a few months after this reversionary interest fell into possession, the plaintiff's title to the annuity was disputed by the wife, upon the ground that by the death of the husband the legal interest in the annuity became vested in her, and had not passed to the plaintiff, no fine having been levied by her.

The wife, at the time of the assignment, had an equitable interest in the annuity or rent charge for her life to her separate use, and the legal interest was then in the husband for the joint lives of himself and his wife; and, in the consideration of a court of equity, the subsequent accession of the legal interest to the wife by the death of the husband, cannot defeat the effect of the equitable assignment of her beneficial interest, which she had before made for a full and valuable consideration.

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[\*360] \*ELIZABETH DONNE v. REUBEN HART.

1831: 25th November, 24th December.

The contingent reversionary interest of the wife, in the trust of a term for years, may be sold by the husband; and the wife surviving will be bound by such sale, though the husband dies before the contingency is determined or the reversion falls into possession.

WILLIAM HANNAM deceased, by his will dated the 17th of October, 1792, bequeathed to trustees, among other things, a leasehold for years, upon trust for his son Thomas Hannam for his life, and after his decease, upon trust for all and every the children of Thomas whom he should leave at the time of his decease, their executors, administrators and assigns, in equal shares and proportions. The testator also bequeathed unto the same

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Donne v. Hart.

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trustees another leasehold for years, upon trust for his wife during her life, and after her decease, for his son the said Thomas Hannam during his life, and after his decease, for all and every the children of his son Thomas, which he should have at the time of his decease, their executors, administrators and assigns, in equal shares and proportions.

The testator died in the year 1794; and his widow shortly afterwards. The son Thomas had several children, one of whom, Elizabeth, intermarried, in the year 1810, with Theophilus Henry Donne.

By an indenture of assignment, bearing date the 20th of August, 1812, and made between Theophilus Henry Donne and Elizabeth his wife of the one part, and Reuben Hart of the other part—reciting that Donne and his wife had contracted \*with Hart for the sale to him of all their right [\*361] and interest in and to the messuages, tenements, stocks, funds, and securities for money bequeathed by the will of William Hannam, for the price or sum of 150*l.*—it was witnessed that, in consideration of 55*l.* paid by Hart to Donne and his wife, and of the further sum of 95*l.* covenanted to be paid within a year after the death of Thomas Hannam by Hart to Donne and his wife, Donne and his wife and each of them granted and assigned unto Hart, his executors, administrators, and assigns, all their estate, right and interest, shares and proportions in all the leasehold premises bequeathed by the will of the testator, to hold the same to Hart, his executors, administrators, and assigns, for the residue of the terms respectively to come therein; subject nevertheless to the life estate of Thomas Hannam therein.

Theophilus Henry Donne died in the year 1828; Thomas Hannam died in the year 1830, leaving five children him surviving.

In Hilary term, 1831, Elizabeth, the widow of Donne, filed a bill against Hart, insisting that the assignment of the leasehold premises was not operative as against her.

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 Deane v. Hart.
 

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Mr. Pemberton and Mr. Bligh, for the plaintiff, cited *Hornsby v. Lee*,<sup>(a)</sup> *Purdew v. Jackson*,<sup>(b)</sup> *Honner v. Morton*,<sup>(c)</sup> and *Watson v. Dennis*;<sup>(d)</sup> and they argued that the same principle, which applied to reversionary interests in personal chattels, extended to a contingent reversionary interest in the trust of a term.

[\*362] Mr. Phillimore, *contra*.

Lord Coke says,<sup>(e)</sup> "A man may have a term for years in the right of his wife, whereof the husband hath power to dispose at any time during his life, and if he surviveth his wife, the law doth give the lease to him. But if he make no disposition thereof, and his wife survive him, it remaineth with the wife. If a man be possessed of a term of forty years in the right of his wife, and maketh a lease for twenty years, reserving a rent, and die, the wife shall have the residue of the term, but the executors of the husband shall have the rent, for it was not incident to the reversion, for that the wife was not party to the lease. So note, a disposition of part of the term is no disposition of the whole. But if the husband grant the whole term, upon condition that the grantee shall pay a sum of money to his executors, &c., the husband die, the condition is broken, the executors enter, this is a disposition of the term, and the wife is barred thereof; for the whole interest was passed away." In another passage,<sup>(g)</sup> Lord Coke expresses himself thus: "If she (the wife) were possessed of a term for years, yet he (the husband) is possessed in her right; but he hath power to dispose thereof by grant or demise; and if he be outlawed or attainted, they are gifts in law. Upon an execution against the husband for his debt, the sheriff may sell the term during her life; but the husband can make no disposition thereof by his last will. Also, if he make no disposition or forfeiture of it in his life, yet it is a gift in law unto him if he do survive his wife; but if he make no disposition, and die be-

(a) 2 Madd. 16.

(b) 1 Russ. 1.

(c) 3 Russ. 65.

(d) 3 Russ. 90.

(e) Co. Litt. 46, b.

(g) Co. Litt. 351, a.

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fore his wife, she shall have it again." Mr. Butler, in his note,(a) lays down the doctrine in very explicit terms: "If a \*person marries a woman entitled to a possible or con- [\*363] tingent interest in a term of years, if it is a legal interest, that is, such an interest as, upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife, there the husband may assign it, unless perhaps in those cases where the possibility or contingency is of such a nature that it cannot happen during the husband's lifetime." *Grey v. Kentish*,(b) *Bates v. Dandy*,(c) *Theobalds v. Duffoy*,(d) *Sir Edward Turner's Case*,(e) and *Tudor v. Samyne*,(g) are authorities which confirm the same proposition. The assignment of the husband passes the whole of the wife's interest in a term, whether her interest be immediate and vested, or contingent and reversionary.

Mr. Pemberton, in reply, observed that the authorities which had been cited, had reference merely to legal interests in terms. "There are," says Sir William Grant, in *Mitford v. Mitford*(h) "some legal interests which do not admit or stand in need of being reduced into possession, being in possession already, and not lying in action; as terms for years, and other chattels real, of which the legal title is in the wife. They will survive, if no act is done by him; but he may assign them, which passes the legal interest, whether with or without consideration." The doctrine, therefore, had no application to cases in which the conveyance of the husband does not pass any legal interest.

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*Dce. 24th.*—\*THE MASTER OF THE ROLLS:—In this [\*364] case William Hannam by his will gave a term of years, to which he was entitled in certain houses, to trustees, upon trust for his son Thomas, during his life, and after the death of Thomas,

(a) Co. Litt. 351, a. note 304, edition of 1794.

(b) 1 Atk. 280.

(c) 2 Atk. 207.

(d) 9 Mod. 102.

(e) 1 Vern. 7.

(g) 2 Vern. 270.

(h) 9 Ves. 87.



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for such child or children as he should leave at his decease. Thomas had, among other children a daughter, who is the plaintiff, and who during the life of her father, intermarried with Theophilus Henry Donne. Donne, and the plaintiff his wife, in the lifetime of her father, assigned her contingent interest in this term of years to the defendant, for a valuable consideration. Donne died, leaving the father him surviving; and, the father being now dead, the plaintiff claims this term, upon the ground that the assignment to the defendant was void.

It is clear that the wife's contingent legal interest in a term may be sold by the husband; and there is no difference in equity between the legal interests in and the trusts of a term.

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[\*365] \*WILLIAM SIMSON AND RICHARD PARROTT, *v.* JENKIN JONES AND JOHN WILLIAM INNES.

ROLLS.—1831: 15th February, 23d March.

On the marriage of a female infant who was a ward of court, and entitled to a leasehold estate to her separate use, a settlement was made under the order of the court, giving to the trustees a power of sale over the leasehold estate: A sale made by the trustees under the power, during the minority of the female infant, is not valid.

THOMAS KELLY, being possessed of certain leaseholds held for long terms of years, by his will, dated the 18th August, 1818, after other devises and bequests, gave and devised unto his daughter Mary Hern, and the plaintiffs, William Simson and Richard Parrott, their heirs, executors and administrators, all his freehold and copyhold estates not specifically bequeathed, and all other his estate and effects, upon trust, to pay unto his sister, Margaret Doran, for her life, an annuity of 30*l.*, and unto his said daughter, Mary Hern, an annuity of 200*l.* for her life, for her separate use, which several annuities he charged upon his leasehold messuages not specifically bequeathed; and as to all

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the residue of his said trust estate and effects, and not therein before specifically bequeathed, charged with the said several annuities, upon trust for his the testator's grandchildren, Thomas Hern and Margaret Hern, their heirs, executors, administrators and assigns, to be equally divided between them, share and share alike, as tenants in common, to be paid, assigned and transferred unto his grandson, when he should attain the age of twenty-one years, and the share of his granddaughter to be paid, assigned or transferred to her when she should attain the age of twenty-one years or marriage, which should first happen; and the testator thereby willed and declared, that the \*share of [\*366] his granddaughter Margaret should be for her own sole and separate use and disposal, exclusive of any husband or husbands with whom she should intermarry, and wherewith he, they or any of them should not intermeddle; neither should the same, or any part thereof, be subject or liable to his or their or any of their debts, control, management or engagements, but the receipt or receipts of his said granddaughter alone, or of such person or persons as she should from time to time order, direct or appoint to receive the same, should only be effectual and sufficient discharges for the same. In case either of his grandchildren died before his or her share became a vested interest, the share of him or her so dying, was to go to the survivor: the share of his grandson was to become a vested interest on his attaining his age of twenty-one years, and that of his granddaughter on her attaining the age of twenty-one years or marriage; and in case both his grandchildren should depart this life without attaining vested interests, the testator gave the trust property over as therein mentioned. He appointed his daughter Mary and the plaintiffs, executrix and executors of that his will.

Thomas Kelly died on the 13th August, 1823, and the plaintiffs alone proved his will. The daughter Mary did not prove the will, or act in the execution of the trusts of it; but she was appointed guardian of her children by an order of the Court of Chancery made upon petition.

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Some time afterwards Thomas Hern and Margaret Hern, by their mother, as their next friend, instituted a suit in the Court of Chancery against the two trustees and executors, and Margaret Doran, for the administration of the estate of the testator, and the \*execution of the trusts of his will; and

[\*367] George Eshelby having made proposals of marriage to the granddaughter, who was then of the age of eighteen years, it was by an order, dated the 22d of January, 1829, referred to the Master to consider and certify whether George Eshelby was a proper person for the plaintiff, Margaret Hern, to intermarry with: and if the said Master should be of opinion that he was a proper person, he was to lay proposals before the Master, and the Master was to inquire and certify whether the same were fit and proper to be carried into execution.

The Master, by his report, dated the 11th of February, 1829, certified that George Eshelby was a proper person for the plaintiff, Margaret Hern, to intermarry with, and approved of a proposal which had been laid before him for the settlement of her property.

By another order, dated the 12th of February, 1829, the Master's report was confirmed; and it was referred to him to approve of a proper settlement, or articles for a settlement, upon the basis of the proposal mentioned in his report; and upon the execution of the settlement, Margaret Hern and George Eshelby were to be at liberty to intermarry.

The indenture of settlement approved by the Master was dated the 26th of February, 1829, and was made between George Eshelby of the first part; Margaret Hern, described as an infant of the age of eighteen years or thereabouts, of the second part; John Lucas and Mary his wife (formerly Mary Hern, and described as the mother and guardian of Margaret Hern), of the third part; and Simson and Parrott of the fourth part. After reciting the will of Thomas Kelly, and stating that the bequest of his residuary estate to Mary Lucas jointly with

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\*Simson and Parrott had never been accepted by [\*368] her, John Lucas and Mary his wife, so far as regarded the legal operation of the said residuary bequest, thereby renounced and disclaimed, and so far as there might have been any assent to the said residuary bequest in respect to Mary Lucas, or any acceptance thereof by her or on her behalf, remised and released unto Simson and Parrott the residuary bequest, and all such legal estate of and in the estates and premises in such bequest comprised, as otherwise might be vested in John Lucas and Mary his wife, to the intent that the said residuary bequest might take effect in Simson and Parrott, exclusively of the said Mary Lucas. The indenture then witnessed that all the undivided moiety, and all other the part, share, estate, and interest, of or to which Margaret Hern, under or by virtue of the will of Thomas Kelly, was then or should at any time thereafter, by accruer, survivorship or otherwise, become or be possessed or entitled, in possession, reversion or expectancy or otherwise, of or in the testator's residuary freehold, leasehold and other personal estates, should (subject and without prejudice to the annuity to Mary Lucas, and other beneficial interests) stand and be settled, and that Simson and Parrott, their heirs, executors, administrators and assigns respectively, should stand and continue seised, possessed and interested of and in the same, upon trust, after the solemnization of the marriage, with all convenient speed, and within the period of three years from the date of the indenture, if the same could be conveniently effected, but if not, then as soon as might be after the expiration of that period, and either with or without the consent or concurrence of any other person or persons who might be necessary or proper and competent in that behalf, as the particular circumstances of the case might require, to sell and dispose of so much and such part and parts of the said testator's said residuary estate, or of the said \*Margaret Hern's moiety, share, estate, and in- [\*369] terest thereof and therein, as should consist of or comprise any freehold or leasehold estates, either by public auction or private contract, to any persons willing to become the purchasers, for the best prices which at the time of such sales might

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be reasonably had for the same; and for that purpose to enter into, make and execute all such covenants, contracts, agreements, conveyances, assignments, &c., as to the trustees should seem reasonable and necessary. The indenture contained the usual clause making the trustees' receipts an effectual discharge for the purchase moneys. It was then declared that the trustees should stand possessed of the moneys to arise from the sale of the said Margaret Hern's moiety of the said premises, upon certain trusts therein stated, for the benefit of Margaret during her life, to her separate use; after her decease, for the benefit of George Eshelby, during his life, determinable as therein mentioned; and then for the benefit of the children of that marriage, and also of such other children of Margaret as she might direct to be let in to participate; failing all such children, then as she should by will appoint, and in default of appointment, for her executors or administrators, in manner therein mentioned.

The settlement was executed and the marriage duly solemnized.

Thomas Hern attained his age of twenty-one years on the 24th of March, 1830; and, by indenture dated the 14th of April, 1830, assigned unto Simson and Parrott, their executors, administrators and assigns, his moiety and interest, by virtue of the will of Thomas Kelly, in the several leasehold premises, being [\*370] part of the testator's \*residuary estate, upon trusts for sale similar to those contained in the settlement.

An arrangement was at the same time completed, by which the leaseholds were exonerated from Mary Lucas' annuity: the other annuitant, Margaret Doran, was dead.

On the 26th of May, 1830, the trustees put up some of the leaseholds for sale by public auction; and at that sale Jones, on behalf of himself and the other defendant Innes, became the purchaser of two of the lots, paid the deposit, and signed an agreement for the completion of the purchase. Upon the investigation of the title, it was objected that the settlement, though

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made under the sanction of the court, could not bind the interest of an infant in leaseholds for years, limited to her separate use; that the infant, when she came of age, might repudiate the settlement; and that, therefore, a good title could not be made under the power of sale which the parties had attempted to give the trustees. The vendors were advised that the objection was not tenable; and, on the 25th of November, 1830, they filed a bill for specific performance of the agreement. The defendants, in their answer, rested their defence on the objection already suggested. Mrs. Eshelby was still under age.

Mr. *Bickersteth* and Mr. *Evans* for the plaintiffs.

Although the acts of infants, generally speaking, may be void or voidable, according to circumstances, yet marriage agreements are different from all others; and it has been repeatedly decided that settlements of jointures in lieu of dower, and settlements of the personal estate of infants, made by parents or guardians on their \*behalf, before and in consideration of [\*371] marriage, are conclusively binding upon such infants: *Harvy v. Ashley*,<sup>(a)</sup> *Drury v. Drury*,<sup>(b)</sup> *Theobalds v. Duffoy*,<sup>(c)</sup> *Corbet v. Corbet*.<sup>(d)</sup>

Courts of equity possess, and have uniformly exercised, an intrinsic jurisdiction and authority (including and exceeding all the powers recognized as existing in guardians) to deal, in the way of settlement, and for other beneficial purposes, with the property, and more particularly the personal property of infants, without reference to the competency either of the infant or of any other party. No proceeding is more common than for the court to refer it to the Master to inquire whether a certain arrangement will be for the benefit of an infant; and if he finds in the affirmative, the arrangement is carried into effect, and the

(a) 3 Atk. 607.

(b) 2 Eden, 39; 3 Bro. P. C. 492, Toml. edition.

(c) 9 Mod. 102.

(d) 1 Sim. & Stu. 612; 5 Russ. 254.

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infant is bound by it. Here the settlement, having been made, not only with the approbation of the mother and guardian of the infant, but under the deliberate sanction and order of the court, must be presumed to be, and to have been held to be, beneficial to the infant; and she, therefore, will not be allowed to impeach it. There is no doubt that if the leaseholds had not been limited to her separate use, the settlement would have bound her; and the annexation of that equitable incident to her estate, furnishes a ground rather for giving the court a right of more extensive control than for excluding its jurisdiction *in toto*. The limitation of interests to the separate use of a married woman is altogether a creature of equity, which the court modifies and regulates without reference, and, in some particulars, in opposition, [\*372] to the principles of the common law; and a peculiar interest, thus created by the court, ought not to be allowed to stand in the way of the salutary protection which the court would otherwise extend to the infant. It would be a singular result that, if the moiety of the leaseholds had been given by the testator to his granddaughter without any expression of intention on his part to secure the property from the husband, the court would have carefully settled the property; and yet, the testator having expressed that intention (but without restraining anticipation), that the court should, for that very reason, abstain from giving her the protection to which she would otherwise have been entitled. If the objection taken to this title prevail, many settlements on the marriage of infants will be invalidated, which have been made on the faith of the competency of parents and guardians, or of the Court of Chancery, to deal with their personal property.

Mr. Pemberton, Mr. Preston, and Mr. Stuart, for the defendants.

Cases of jointure have no application to the present question. Dower is a provision which the law has given to the wife out of the property of her husband; the law has also provided that that right may be excluded by a jointure; and after considerable difference of opinion, it was finally settled that the lady, though

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an infant, shall be excluded from dower by a jointure, which her parent or guardian accepted for her as a reasonable provision. But neither parent, nor guardian, nor the court, has any power to enter into a contract which shall bind the property of a female infant, so as to exclude her from exercising over it those rights which she would otherwise have: *Clough v. Clough*,(a)

\**Durnford v. Lane*,(b) *Slocombe v. Glubb*,(c) *Milner v.* [\*373] *Lord Harewood*.(d)

A settlement of a female infant's real estate, made on her marriage, does not bind her. It is true that a settlement of her personal estate is binding; but it is binding only as the settlement and contract of the husband, affecting and restricting the interest which he takes in her personal property by his marital right, not as the contract of the wife, limiting any rights which she would otherwise have.(e) Where personal property is limited to the separate use of a female infant, she is, *qua* that property, in the same situation as if she were a male; marriage could give the husband no interest in or control over it; the settlement cannot restrict his rights, for the marriage gave him none; and how can the contract of the female infant give him rights which the marriage could not give him, or deprive her of rights which would remain in her notwithstanding coverture.

Where the court acts for infants, it acts merely as a trustee: *Ex parte Phillips*,(g) *Ware v. Polhill*.(h) The circumstance that the settlement was made with the sanction and under the approbation of the court, might induce the court to prevent any person from \*disturbing its arrangements, while [\*374]

(a) 3 Wooddeson, 453, note. 5 Ves. 710.

(c) 2 Bro. C. C. 545.

(b) 1 Bro. C. C. 106.

(d) 18 Ves. 259.

(e) How will this view of the law be affected by the doctrine which seems to be laid down in *Massey v. Parker*? (2 Mylne & Keen, p. 174). If personal property is given to a female unmarried infant to her separate use, and she marries after she attains twenty-one, does that property vest in the husband, so that he has an absolute power of disposing of it? If it does, what will his rights be, if the infant marries before she attains twenty-one, and without a settlement?

(g) 19 Ves. 118.

(h) 11 Ves. 247.



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the minority continues; but if Mrs. Eshelby, when she comes of age, chooses to repudiate it, the court has no power to make it binding upon her.

Mr. *Bickersteth*, in reply.

THE MASTER OF THE ROLLS :—In this case, a settlement is made, on the marriage of the infant, of leaseholds which were already secured to her separate use, and the question is, whether that disposition shall prevail. I am of opinion that the question is to be decided on the general principle, that an infant is incapable of contract or alienation.

Where a female infant possessed of personal property marries, and a settlement of that property is then made, the settlement operates, not as a contract by the wife, but as a limitation by the husband of his marital rights. Accordingly, no settlement or contract for a settlement, made on the marriage of a female infant, can affect her interest in her freehold estates.

It has been argued that the settlement was made after a reference to the Master, and with the approbation of the court. Where an infant is bound to elect, the court will decide for the infant what election ought to be made; but this court has no authority to give an infant a power of alienation, even for her own benefit.

I am of opinion that the trustees cannot make a good title; and the bill must be dismissed with costs.

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[\*375]     \**March 23d.*—A communication having been made to the Master of the Rolls, that some of the parties were anxious for a more full explanation of the grounds of his decision, his Honor gave the following judgment.

The testator, Thomas Kelly, by his will gave to his grandson and granddaughter, Thomas Hern and Margaret Hern, afterwards

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Margaret Eshelby, their executors, administrators and assigns, the equitable interest in certain leasehold estates, to be equally divided between them as tenants in common; to be a vested interest as to the grandson when he should attain twenty-one, and as to the granddaughter when she should attain twenty-one or marry, which should first happen; but to be to her separate use, independent of any husband whom she might happen to marry. The granddaughter being made a ward of court, and the court having, in contemplation of her intended marriage with George Eshelby, referred it to the Master to approve of a proper settlement of her fortune, a certain indenture of settlement was, in pursuance of the Master's report, made and executed by and between the said George Eshelby of the first part; the said Margaret Hern, the intended wife, therein described to be an infant of the age of eighteen years, of the second part; and Mary Lucas, the mother and guardian of the said Margaret Hern, of the third part; whereby it was declared that the said Margaret Hern's moiety of the said leaseholds should continue and be vested in the plaintiffs, who were the trustees under the will of the said testator, Thomas Kelly, upon trust to sell and dispose of the same as soon as conveniently might be, and to stand possessed of the moneys to arise from such sale upon the trusts therein mentioned.

By a certain other indenture the moiety of the grandson in the said leaseholds was in like manner continued and vested in the said trustees for the like purpose of sale.

\*In pursuance of these indentures the plaintiffs, the \*[376] trustees, put up for sale the leasehold premises by public auction on the 26th of May, 1830; and the defendants, Jones and Innes, became the purchasers of part of the property, and signed agreements in writing accordingly; but, they having afterwards refused to complete their purchase, on the ground of a defect in the title as it regarded the moiety of the granddaughter, the present bill was filed by the plaintiffs for the specific performance of the contract.

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per annum; and in case either of my nephews should die, the other to inherit the whole 300*l.*; and if my brother Jacob Agace dies without issue, then my two nephews, Zachariah Agace and Daniel Agace, to inherit from my brother Jacob Agace. I also give and bequeath to my aunt, Mary Agace, 25*l.* per annum; I also give and bequeath Mrs. Temperance Cole 25*l.* per annum; these last are only for life, then to my dear wife. The reason why I leave only the interest to my brother Jacob and my two nephews is, that if they die without issue, the money may go to my relations, to be divided between my cousins, James Legrew, Mrs. Susan Godard, widow of John Godard, and Mrs. Esther Privo, wife of Mr. Nicholas Sebire, three shares equally alike." The residue of his estate he gave to his wife Martha.

The testator died in the year 1778.

[\*379] \*A sum of 20,000*l.* 3 per cent. consolidated bank annuities was set apart to provide for the 300*l.* a year and the two payments of 150*l.* a year given by the testator to his brother and two nephews. Jacob Agace died in the year 1782 without issue; from which time the dividends of the 20,000*l.* stock were divided equally between the two nephews. Zachariah Agace died without issue; and Daniel Agace received the 600*l.* a year till the year 1828, when he also died without issue.

The bill was filed by the representatives of James Legrew, Susan Godard and Esther Privo, who were all dead, against the personal representatives of the testator, who were also the personal representatives of his widow and residuary legatee, and of Daniel Agace, the survivor of the nephews. It prayed a declaration that the plaintiffs were entitled in equal shares to the moneys invested for securing the three annuities.

The defendants, by their answer, submitted that the gift over to the cousins was too remote, being a gift on a general failure of the issue of the brother and the two nephews.

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Mr. *Bickersteth* and Mr. *Lovat*, for the plaintiffs.

The question is, whether the gift to the three cousins is to take effect only on a general failure of issue of the brother, and nephews, or on a failure of their issue in their lifetime. Here there are two circumstances which show that the testator meant a failure of issue in the lifetime of the brother and nephews. First, the fund is not given absolutely to the brother and the nephews; the interest of it only is given to them for life in the particular manner pointed out in the will; and when the testator professes to assign a reason for the disposition \*which he makes of the property after their death, he [\*380] must be understood to speak with reference to the state of things which might exist at their death. The testator in effect says, "My intention is that the capital of the fund, which is to provide for these annuities, is to go, at the death of my brother and nephews, if they die without issue, to my three cousins." Can any person doubt that "death without issue," in such a disposition, must have reference to the death of the survivor of the brother and nephews? Second. In the preceding part of the will, "dying without issue" is a phrase used to denote not a general failure of issue, but a failure of issue within the compass of a life in being. When the testator says, "if my brother Jacob Agace dies without issue, then my two nephews, Zachariah Agace and Daniel Agace, to inherit from my brother Jacob Agace," he unquestionably means to refer to a failure of issue of Jacob Agace at his death, and in the lifetime of the two nephews. Such is the construction of the will, which all parties have acted upon; and if "dying without issue" be held, in this passage, to denote a general failure of issue, the limitation over of the 300*l.* a year to the nephews during their lives, would be open to the same objection which the defendants raise to the claim of the representatives of the cousins. In like manner, when the testator says, "in case either of my nephews should die, the other to inherit the whole 300*l.*," he plainly refers not to the death of one of the nephews at any time, but to the death of one of them in the lifetime of the other. Finding

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in the will, that, when dying is mentioned, it means dying in the lifetime of "the other of two persons," and that when dying without issue is mentioned, it denotes not a general failure of issue, but a failure of issue in the lifetime of the nephews; the fair inference is, that when the testator has given the interest of [\*381] a fund to a brother and nephews for life, \*and proceeds to limit it to other persons, if they die without issue, he intends a failure of issue in the lifetime of the survivor of the brother and nephews.

*Mr. Pemberton, contra.*

The testator has given annual sums to his brother and two nephews, so that the surviving nephew takes the whole; and upon their death without issue, he has limited over the capital to his cousins. "Death without issue" denotes a general failure of issue, whether as used in reference to real or personal estate, unless there be something in the will to show plainly a different intent: *Love v. Windham*, (a) *Dingly v. Dingly*, (b) *Burford v. Lee*, (c) *Boden v. Watson*, (d) *Boehm v. Clarke*, (e) *Barlow v. Salter*, (g) *Ward v. Bevil*; (h) *Fearne on Contingent Remainders*. (i)

In this will there is nothing to limit the failure of issue to a particular time. The circumstance that the brother and nephews have an interest which expires with their lives cannot have that effect, unless it is to be said, in opposition to settled rules, that if personal property is given to A. for life, and if A. dies without issue, to B., the remainder to B. is not too remote. When the testator, in the preceding part of the will, says, "if my brother Jacob Agace dies without issue, then my two nephews Zachariah Agace and Daniel Agace to inherit from my brother," there is a plain implication that he refers—not to failure of the brother's issue generally—but only to failure of his issue in the lifetime

(a) 1 Lev. 290.

(b) 2 Freem. 40.

(c) 2 Freem. 210.

(d) Amb. 298.

(e) 9 Ves. 580.

(g) 17 Ves. 479.

(h) 1 Yo. & Jerv. 512.

(i) p. 444.

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of the nephews: because it is evident from the subsequent part \*of the will that the nephews are to take \*[382] only for life; and, consequently, the event on which they are so to inherit, must be an event which is to happen in their lifetime. But the will does not furnish any circumstance of this kind, which can have the effect of limiting to particular lives the failure of issue, on which the capital is given over.

Mr. *Bickersteth*, in reply.

In none of the cases cited did the person, on whose failure of issue the limitation over was to have effect, take only an annuity. Besides, the rule of law is not controverted; and the question is, does not enough appear on the face of this will to show, that the failure of issue on which the cousins were to take the capital which yielded the annuities, when the annuities expired, was a failure of issue in the lifetime of the surviving nephew.

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*February 15th.*—THE MASTER OF THE ROLLS:—The question in this cause is, whether, upon the true construction of the will, it appears to be the intention of the testator that the death without issue of the three annuitants is to be a death without issue generally, or a death without leaving issue living at the time of the death.

In directing that, in case either of his nephews should die, the other is to inherit the whole 300*l.*, it is plain, from the subsequent passages in the will, that the testator means only that the survivor shall take the annuities of 150*l.* each for his life. So, in directing that if his brother Jacob should die without issue, then his \*two nephews should inherit from his \*[383] brother, he in like manner means that his two nephews shall take between them the 300*l.* for life; and in this case the words “without issue,” meaning a death without issue in the lives of his nephews, the limitation over to them would be good.

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But when, in the subsequent part of the will, he gives the money which would produce the annuities to the persons represented by the plaintiffs, in case of the death of his brother and two nephews without issue, there are no words which can authorize a court to declare that he meant death without issue living at the time of the death of his brother and nephews, any or either of them.

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*November 15th.*—The plaintiffs appealed from his Honor's decision.

The *Solicitor-General*, Mr. *Lovat* and Mr. *Sidebottom*, in support of the appeal.

\* The court has always been astute to discover and give effect to any circumstances and expressions in a will, from which an intention can be collected to cut down the legal signification of the words, "dying without issue," and to restrict it to the popular sense of death without issue in the lifetime of the first taker. Even trivial expressions have been held sufficient for this purpose, where the obvious intention required such a construction. *Pinbury v. Elkin*,<sup>(a)</sup> *Nichols v. Hooper*,<sup>(b)</sup> *Wilkinson v. South*,<sup>(c)</sup> *Trotter v. Oswald*,<sup>(d)</sup> *Chamberlain v. Jacob*,<sup>(e)</sup> *Gawler v. Cadby*.<sup>(g)</sup> The expression, "to inherit from my brother," is surely as strongly indicative of an intention to confine the failure [<sup>\*384</sup>] of \*issue to the lifetime of the brother, as the words "then after her decease," or "at their death," upon which *Pinbury v. Elkin*,<sup>(h)</sup> and *Rackstraw v. Vile*,<sup>(i)</sup> were determined in favor of the limitation over. *Prima facie* indeed, there is every probability that the nephews, who were to inherit the annuity of 300*l.* from the testator's brother, were intended to take the same interest in that as they were to take in their own

(a) 1 P. Wms. 563.

(b) 1 P. Wms. 198.

(c) 1 T. R. 555.

(d) 1 Cox 317.

(e) Amb. 72.

(g) Jac. 346.

(h) 1 P. Wms. 563.

(i) 1 S. & St. 604.

annuities; and these were expressly annuities for their lives only. The subject matter of the gift, besides, is not a sum of money in gross, but simply the interest of a fund, or rather, annuities of a definite amount, with respect to which it seems the natural and probable intent, even if the testator had not in the subsequent clause assigned a reason for the peculiar form of his bounty, that, upon the death of all the annuitants leaving no issue, the rights of the legatees over, which were to be contingent on that event, should immediately take effect.

Assuming, then, that the nephews took no more than life interests in the annuities, not enlarged by any subsequent words into *quasi* estates tail, the limitation over being expectant upon mere life estates, would have the effect of cutting down the failure of issue on which it was made to depend, to a failure on the dropping of the lives. This doctrine, which appears to have the sanction of Lord Hardwicke in *Trafford v. Boehm*(a) is highly reasonable in itself; for as by the supposition the nephews took estates for life only, and their issue could take nothing by implication as purchasers, the time to which the failure of issue spoken of must of necessity be referred, is the time when the life interests were to cease.

\*Sir *E. Sugden* and Mr. *Preston*, for the defendants.      [\*385]

The general rule, as laid down by Lord Eldon in *Chandless v. Price*,(b) is undisputed; that wherever "the words would raise an estate tail in real estate they will give the absolute property in personalty, and if there is no distinct expression to restrain it to the time the law allows, the consequence must prevail; whatever is the intention." The words "inherit from my brother" cannot operate to confine the estate given to the nephews in the annuity of 800*l.* to mere life interests. The nephews were to take what the brother had enjoyed, by a sort of succession from him; but it was not necessarily immediate succession, and the

(a) 3 Atk. 440.

(b) 3 Ves. 99.



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expression would be equally appropriate if the property which they were to inherit were to devolve on them from the brother after his issue had become extinct. To the plaintiffs, however, it is quite immaterial whether the testator's nephews took a mere life estate or an absolute interest. In either view the gift over is too remote, being limited after a general failure of issue of the first taker. It might have been a question whether, if the nephews had left issue, their estate was enlarged by the effect of the limitation in case of their death without issue to a *quasi* estate tail, as in *Love v. Windham*; (a) or whether the issue would take by implication as purchasers. (b) But with that the plaintiffs have no concern; nor is it any argument in favor of their present pretension that there is no person *in esse* before them who is capable of taking, so long as the event upon which alone their interest is to arise is too remote; and of that it is impossible to raise a doubt; for it is plain, upon the language of the [\*386] clause assigning the reason for the gift, \*that while any issue of the nephews were in existence the cousins were to take nothing.

The testator obviously had two intentions, one, that his nephews should have the annuities for their lives; the other, that in some way or other their issue, if they had any, should be permitted to enjoy the capital of the fund: and to accomplish that object, the court would probably hold the life estates to be enlarged so as to give the children a benefit through the medium of their parents. At any rate it is admitted, that if the nephews left issue, the claim of the plaintiffs would be excluded; although that exclusion, if the argument on the other side be sound, would be of no benefit to the issue, and would, therefore, be irrational and absurd. No such doctrine as has been supposed is to be found in *Trafford v. Boehm*; (c) nor has it ever been established in any case, that because the estates first given are life estates, and the limitations over (not being mere life interests)

(a) 1 Lev. 290.

(b) See *Ex parte Rogers*, 2 Madd. 449, *Andree v. Ward*, *Greene v. Ward*, 1 Russ. 260.

(c) 3 Atk. 440.

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are made to depend on a failure of issue of the first takers, the failure of issue referred to is a failure of issue at the death of the first takers. The proposition supposed to be stated in that case was, that the circumstance of the limitations over being for life only (which is not the case with which the court has now to deal, for the gift over to the cousins is of the *corpus* of the fund), was to be considered as warranting an inference that the specified failure of issue was a failure at the death of the first taker; and that proposition which could have no application here, and which never had the sanction of Lord Hardwicke, is completely exploded by Sir W. Grant in *Boehm v. Clarke*(a) and *Barlow v. Salter*,(b) authorities which dispose of the present question.

\*It has been repeatedly decided, and is now settled [\*387] law, that with reference to the effect of a bequest to a man for life, and if he die without issue, the principal to go over, it makes not the slightest difference whether the bequest is of the interest of money or of money itself.(c) *Butterfield v. Butterfield*,(d) *Everest v. Gell*.(e)

The *Solicitor-General*, in reply.

THE LORD CHANCELLOR:—I have no doubt whatever that taking the whole together, this is a limitation upon a general failure of issue, and that the executory bequest is consequently void. I will take it in two ways; first, supposing the bequest to have stood without the superadded words, "the reason why," &c.; and secondly, importing those words into the consideration of the question.

In the first place, it is clear, if the bequest to the cousins if the brother and nephews should die without issue had stood alone, without the clause explaining the nature and object of the prior gift, that according to the authority of all the cases, and to

(a) 9 Ves. 480.

(c) Fearn's C. R. p. 475.

(e) 1 Ves. jun. 286.

(b) 17 Ves. 579.

(d) 1 Ves. sen. 133, 154.

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what is now admitted to be the clear law, it would have been void as being a limitation after a general failure of issue; and that in that respect it makes not the least difference whether the first legatee took an express estate for life, or whether he took a larger interest. In either case the failure of issue spoken of is construed to be a failure of issue at any period of time, the first estate is held to be enlarged by implication into an absolute interest, and the limitation over is void for remoteness.

[\*388] \*This doctrine has been so fully established by the case of *Love v. Windham*,<sup>(a)</sup> where the estate of the first taker was expressly a life estate; and by two cases in *Freeman*,<sup>(b)</sup> where the gift to the first taker was to him generally without being so restricted, that it is unnecessary to do more than refer to it now.

The next consideration is, whether any substantial distinction can be founded on the subsequent clause: "The reason why I leave only the interest to my brother Jacob and my two nephews is, that if they die without issue the money may go to my relations." That clause seems to me rather to strengthen the respondent's argument that the cousins were entitled to take nothing so long as any issue of the nephews were in existence, and that a general failure of issue therefore was in the testator's contemplation. I will assume, however, as has been argued at the bar, that this clause, coupled with the rest of the instrument, clearly shows that the nephews to whom the annuity of 300*l.* was given over in the event of the brother dying without issue, were to take by the gift a life interest only. The observations of Lord Hardwicke in *Trafford v. Boehm*,<sup>(c)</sup> which have been referred to, were originally misapprehended by Sir W. Grant in his remarks upon that case in *Boehm v. Clarke*;<sup>(d)</sup> but he afterwards took an opportunity, when giving judgment in *Barlow v. Saller*,<sup>(e)</sup> to cor-

(a) 1 Lev. 290.

(b) *Burford v. Lee*, 2 Freem. 210, and Anon. ibid. 287.

(c) 3 Atk. 440.

(d) 9 Ves. 580.

(e) 17 Ves. 479.

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rect his mistake, and at the same time to deny the proposition which Lord Hardwicke had been supposed to lay down, that where the gift over is for life merely, that limits the failure of issue on which the subsequent gift is made to depend to a failure at the death of the first taker. \*This proposi- [\*389] tion, so far from deriving any countenance from the judgments of Sir W. Grant in *Boehm v. Clarke* and *Barlow v. Satter*, is directly opposed to them. At all events, it is not easy to see what bearing it can have upon a case like the present, where the gift over with which the court has to deal is a gift to the cousins, in terms which would carry an absolute interest in the fund. The rest of the cases referred to on behalf of the appellants, appear to me to have no application.

It is not necessary for the present purpose to decide, and it was not necessary for the defendants to argue the question, whether the nephews took mere life estates, or whether they took absolute interests; although looking to the wording of the clause in which the testator assigns the reason for the peculiar form of his gift, the words seem to import a general failure of issue, and strongly favor the opinion that they took absolute interests. The judgment of his Honor must be affirmed.

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\*CAMPBELL v. HARDING.

[\*390]

1831: 12th and 26th July.

A testator by his will gave to Caroline, described as his natural daughter, a sum of stock, and his house and land at C.: with a direction that if she married, the property should be settled solely upon herself and children; but in case of her death without lawful issue, the money so left to her to be equally divided betwixt his nephews and nieces who might be living at the time, and the land at C. to his nephew J. H.: Held, that Caroline took an absolute interest in the stock.

JOHN HARDING by his will duly attested, gave and bequeathed as follows: "To my adopted daughter, commonly called Caro-

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line Harding [described in another part of the will as his natural daughter], the sum of 20,000*l.* 3 per cent. consols, and my house and landed property at Culworth, also of Morton Pinkney; but in case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time; and the land, &c., at Culworth, to my nephew, the Rev. J. Harding; and that at Morton Pinkney, to my nephew, Lieut. John Harding. And I request my much esteemed friends, Robert Campbell, Esq., and Daniel Stuart, Esq., to be the guardians, and allow whatever they please for her education annually; and after she has left school, and if she marries, it must be with their consent, and the property to be solely settled upon herself and children, and in no way changed or alienated. . . . . I leave to each niece and nephew of mine the sum of 1,000*l.*; and to Charlotte Ann Harding, my niece, daughter of my late brother Francis, the sum of 3,000*l.*; but in case of her death without issue, this 3,000*l.* to revert back, and to be divided betwixt my nephews and nieces who may then be living. . . . . What property I may die possessed of, not otherwise appropriated, I divide into fifteen shares, seven of which to be for my brother William, and after him, to his seven children; five for my sister Candy, and after her, to her five children; and the remaining three to my sister Wright, and her children afterward."

[\*391]      \*One of the questions in the cause was, whether the 20,000*l.* stock bequeathed to Caroline Harding vested in her absolutely, or whether she took it subject to an executory bequest over. The Vice-Chancellor decided that Caroline Harding took an absolute interest in the stock, and that the bequest over, being limited after a general failure of issue, was void.

Subsequently to the date of the Vice-Chancellor's decree, Caroline Harding died, an infant, unmarried, and without issue; leaving a will, of which her guardians, the plaintiffs Campbell and Stuart, were appointed executors. Charlotte Ann Harding shortly afterwards intermarried with John Pulman; and the

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suit having been duly revived, the present appeal was brought by the defendants claiming interests in the 20,000*l.* stock under the limitation over to the testator's nephews and nieces.

Mr. *Thwiss*, Mr. *Teed*, and Mr. *Hodgkin*, in support of the appeal.

It is not denied that if the words, "in case of Caroline Harding's death without issue," had stood unexplained, they must according to settled decisions be taken, not in their natural sense as meaning "in case she leaves no issue at the time of her death," but in their legal sense, as importing the failure of her issue whenever that may happen, however long after her natural death; but as this technical construction frequently defeats a testator's intent in favor of the legatees over, by enabling the first taker, having no issue, to dispose of the property to strangers, the court, more especially in cases of personal estate where technicalities are less regarded, eagerly catches at anything in the will, which, by indicating that the vesting of the ulterior interests is not to be postponed to the indefinite and possibly \*remote pe- [\*392] riod when the first taker's issue shall be extinct, raises an inference that the failure of issue spoken of is to be referred to a definite and not very distant period. such as the happening of the first taker's death, or the determination of some other life or lives in being. In favor of this, which has been called the natural and grammatical sense of the words, (a) judges have always felt a strong leaning; and they have, therefore, been anxious and astute to discover words or circumstances in the instrument itself, which would justify them in departing from the technical construction, and in restricting the event on which the ulterior gift is made to depend to a period within which, by the rules of law, it may be capable of taking effect. (b)

This will may be considered with reference either to the provisions specifically made for Caroline Harding herself, or to the

(a) *Bigge v. Bensley*, 1 Bro. C. C. 187.

(b) *Fearne Cont. Rem.* 471.

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general scope of that part of the instrument with which her interest is not expressly connected ; and, considering in either view, it furnishes strong grounds for construing the words "death without issue," according to their natural rather than their legal import.

In order to give effect to every part of a will, the collocation of the clauses or limitations may be disregarded, provided the court can, by transposing them, deduce a consistent and intelligible disposition from the whole ; *Anon.*(a) *Ridout v. Dowding.*(b) Now this testator's primary object was to provide for Caroline Harding and her issue ; and if she should have no issue, [\*393] then to provide for his nephews and \*nieces. After bequeathing in general terms 20,000*l.* stock to Caroline, and if she should die without issue, to his nephews and nieces, the testator proceeds to qualify the bequest. He makes provision for the three events of her marrying, of her having children, and of her dying without issue. To take these events in their natural order ; the will first requires that if she marries, it shall be with the consent of her guardians ; secondly, as to her children, the property is to be solely settled upon herself and children, and in no way changed or alienated. So far, therefore, from being intended to have any absolute interest in the fund, she was not to anticipate a single shilling of it. It was to be put in settlement—solely settled upon herself and children. A settlement framed in conformity with this direction would necessarily restrict her to a mere life interest in the event of her leaving children ; and even if she died childless before any settlement was made, her death without children would vest in her no ultimate disposable interest. If the property had been land, such a disposition as this direction for a settlement implies, would give an estate to the children as purchasers, and to her only a life estate, without any subsequent estate in tail or in fee to arise in default of children ; *Ginger v. White.*(c) Besides the two first events provided for, the marrying and the leaving children, there might also be a

(a) Cro. Eliz. 9.

(b) 1 Atk. 419.

(c) Willcs, 348.

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third—her death without having had any children to take under the contemplated settlement. The testator accordingly goes on: “in case of her death without issue, I then will the money to my nephews and nieces living at the time.” In what sense of death without issue? Plainly in that sense, and with reference to that object which had been already considered; with reference to \*such issue as were to take under the settlement, viz., [\*394] children. That was the construction supported in *Ginger v. White*, where the words “without issue,” were held to mean, “without the class of issue before mentioned in the same will,” that is, without children. So in *Goodright v. Dunham*,<sup>(a)</sup> *Hockley v. Mawbey*,<sup>(b)</sup> *Blackborn v. Edgley*.<sup>(c)</sup> That the will here sets out with general words of gift to Caroline Harding is immaterial; for if the argument be well founded, that the wording of the ulterior bequests is strong enough to exclude the construction of a general failure of issue, those bequests are not too remote, but will be upheld as good executory limitations, notwithstanding that the previous gift purports to be absolute. Such would be the inference even if the property here disposed of were real estate: in personalty the court leans much more strongly to support the bequests over; *Doe v. Dyde*,<sup>(d)</sup> *Salkeld v. Vernon*,<sup>(e)</sup> *Vandergucht v. Blake*.<sup>(g)</sup> In no case where the word “issue,” would bear the sense of children, has the law construed the expression, “in case of the first taker’s death without issue,” as importing indefinite failure, and consequently enlarging the first taker’s life estate into an absolute interest. These provisions, therefore, are significant indications that death without issue, meaning death without having had any such issue as would have taken under the settlement, and not death without issue indefinitely, was the event in the testator’s contemplation.

Referring next to that portion of the will which relates less particularly to the interests of Caroline Harding than to the general disposition of the testator’s property, the frame

(a) Doug. 264.

(b) 1 Ves. jun. 142.

(c) 1 P. Wms. 600.

(d) 1 T. R. 593.

(e) 1 Ed. 64.

(g) 2 Ves. jun. 534.



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[\*395] and character of the provisions \*are even stronger in favor of giving the restricted construction to the dying without issue upon which the contingent interests of the nephews and nieces are limited to arise. The testator, it is observable, provides only for his nephews and nieces living at the date of his will; in describing them he uses the word "my," which necessarily confines the class so designated to the individuals standing in the specified relation at the time when the will speaks; as much so as if they had been enumerated by name. With no correctness of speech, indeed, could the relationship of uncle and nephew be said to subsist between the testator and the then unborn children of his brothers and sisters. The Master's report finds who the nephews and nieces were, viz., seven Hardings, five Wrights, and three Candys, making with Charlotte Ann Harding sixteen in all, and that they all survived the testator.

The testator indicates no intention of providing for any not already in existence. This is clearly to be inferred from the gift of 3,000*l.* to Charlotte Ann, and of 1,000*l.* to each of the others. The nephews and nieces who take the 1,000*l.* a piece, can be those only who were living in the testator's lifetime; and the nephews and nieces mentioned in the same sentence, among whom the 3,000*l.* are to be divided in case of Charlotte Ann's death without issue, must, of course, be the same individuals who are each to take the 1,000*l.* legacies; in other words, those living at the testator's death: and as, moreover, it is expressly provided, that in order to participate in Charlotte Ann's 3,000*l.* legacy, they must be living at her death, the gift of the 3,000*l.* to those nephews and nieces is a gift confined to persons *in esse*. That being so with respect to the legacy given over upon Charlotte Ann's death without issue, the same intent must be presumed as to the 20,000*l.* stock given over upon the [\*396] \*death of Caroline without issue. The phrases "revert back" points in the same direction. The testator might naturally speak of money reverting back to individuals already existing, and specified in the will, and whose general residuary provision of fifteen shares had been so far diminished by the set-

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ting apart of 3,000*l.* for Charlotte Ann; but he would hardly say the money was to *revert back* to persons not mentioned in any of his provisions, and not yet in existence. These circumstances, which negative any intent to admit after-born nephews and nieces, are material in this view—that as the gift of 20,000*l.* is confined to those who may be surviving at the time of Caroline's decease without issue, the failure of her issue is so restricted that it must happen, if at all, during the lives of nephews and nieces existing at the testator's death—within the compass of lives in being. Had the testator contemplated a general failure of issue, a failure for instance a century after his death, it would have been absurd in him to confine his bequest to those of his nephews and nieces who should be living at the time: he must, therefore, have meant either failure of issue at the time of his daughter's death, or failure of issue within such a time as might not improbably arrive during the lives of some of the nephews and nieces. The case would then fall directly within the principle of *Pells v. Brown*,<sup>(a)</sup> for there is no difference between the words “if Caroline die without issue, then to my nephews living at the time,” and the words “if she dies without issue, living my nephews, then to those nephews.” So in *Lamb v. Archer*,<sup>(b)</sup> the limitation over to B., if A. died without issue, living B., was held good, because the contingency, if it took effect at all, could only take effect within the compass of a life: *Nicholls v. Skinner*.<sup>(c)</sup> Upon this construction Caroline would take an absolute interest in the stock, subject to an executory bequest over, in the event of her death and the failure of her issue during the lives of the sixteen nephews and nieces.

This argument assumes that the language of the will is such as not to admit after-born nephews and nieces; but, even supposing the words were large enough to include them, so that the failure of Caroline's issue after her death might, by an unlooked-for addition to the family of one of the testator's brothers or sisters,

<sup>(a)</sup> Cro. Jac. 590.<sup>(b)</sup> 1 Salk. 225.<sup>(c)</sup> Prec. Ch. 528, corrected from the Reg. Book, 2 Meriv. 135.

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be after her decease postponed beyond the compass of lives in being, that circumstance would not affix to the words the sense of an indefinite failure of issue. Children *in ventre sa mere* are for the purpose of taking, held to be *in esse*; and upon this principle the vesting of the interest might possibly be postponed: but the postponement could be for a very brief period only; for any nephews or nieces of the testator must of necessity come into *esse* within nine months after the decease of his brothers and sisters (and the parents of those brothers and sisters are admitted to have been long since dead), and therefore the gift over would still be within the compass of lives in being. In *Doe v. Welber*,<sup>(a)</sup> the court considered a direction in the will, that the devisee over should pay 1,000*l.* to such persons as the first taker should appoint, or to the first taker's executors, as a sufficient indication that the failure of issue contemplated was a failure at the first taker's death, and not at an indefinite period; inasmuch as the provision respecting the 1,000*l.* was a personal trust left to the discretion of the first taker, a living person; [\*398] *Keily v. Fowler*.<sup>(b)</sup> \*In *Murray v. Addenbrook*,<sup>(c)</sup> the court supported a limitation over on failure of issue male, on the ground that these words were to be considered, upon the whole context of the will, as equivalent to the words "if there shall be no son then living." And the decision of the Master of the Rolls in the very recent case of *Malcolm v. Taylor*<sup>(d)</sup> proceeded upon the same principle.

But the words "living at the time" warrant a construction which, besides bringing the period of vesting to a nearer and more definite point, is also the most obvious and natural, and therefore preferable to the one which has hitherto been contended for—that the property, in case of Caroline's decease without issue, shall go to those nephews and nieces who may be living at the time—at the time, that is, of her departing this life. On this construction, it becomes immaterial whether the words of the will be deemed capable of admitting after-born

(a) 1 B. &amp; Ald. 713.

(c) 4 Russ. 407.

(b) 3 Bro. P. C. 299, Wilm. 298.

(d) Page 416, *infra*.

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nephews and nieces; for then all who take, whether born before or after the testator's death, take vested interests immediately on the expiration of a life in being, viz., the life of Caroline. That such an effect may be properly imputed to the words "living at the time," is shown by a great variety of cases, in which expressions of a similar and certainly not stronger kind, such as, "then after," "immediately after," and "leaving," have been held to cut down the failure of issue, previously spoken of in general terms, to a failure of issue at the time of the first taker's decease; *Pinbury v. Elkin*,<sup>(a)</sup> *Keily v. Fowler*,<sup>(b)</sup> *Roe v. Jeffery*,<sup>(c)</sup> *Wilkinson v. South*.<sup>(d)</sup> These considerations apply with peculiar force, when it is recollected that Caroline was [\*399] an infant, and, as appears upon the face of the will itself, a natural child; and that the testator had therefore an additional motive for anxiously providing, by an effectual limitation over, against the otherwise not improbable contingency of the legacy falling to the crown by her dying intestate and without issue; *Gawler v. Cadby*.<sup>(e)</sup>

As this will, then, after using words which, had they stood alone, would have given to Caroline an absolute interest in the 20,000*l.*, has gone on to qualify those words by clauses directing the property to be given to her children as purchasers, if she should have children, and if not, then to the nephews and nieces, it is clear from those qualifying clauses that the testator did not intend her in any case to take an absolute interest. By deciding that her interest is absolute, the court would at once annul all the words and clauses relating to the 20,000*l.*, except the words "20,000*l.* to Caroline Harding," and everything that follows might just as well have been omitted or expunged. But if, on the other hand, either of the constructions contended for be adopted, effect is given to every part and provision of the instrument, the limitation over is valid and operative, and all the intentions of the testator will be fulfilled.

(a) 1 P. Wms. 563.

(d) 7 T. R. 555.

(b) 3 Bro. P.C. 299, Toml. ed. Wilm. 298.

(e) Jac. 346.

(c) 7 T. R. 589.

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Sir *E. Sugden* and Mr. *Mathews*, in support of the decree, contended that the case fell clearly within the general rule, as established by the two authorities in *Freeman*,<sup>(a)</sup> on which the judgment of the Vice-Chancellor had mainly proceeded; and that the circumstances on which the appellants relied as creating a distinction in their favor were insufficient, considered [\*400] \*either singly or collectively, to justify the court in cutting down the general failure of issue on which the gift over was limited to a failure of issue living at the death of Caroline Harding; *Bigge v. Bensley*,<sup>(b)</sup> *Barlow v. Saller*.<sup>(c)</sup> It could not be disputed that, by the terms of this devise, Caroline Harding took an estate tail in the landed property; and that it was an established principle, subject only to the exception upon the effect of the word "leaving," that wherever the words would raise an estate tail in real estate, they would carry an absolute interest in personalty. The particular circumstances and expressions referred to as a ground for construing the death without issue upon which the limitation over to the nephews and nieces was to take effect, to be a death without issue, in the lifetime of Caroline, were much more slight and equivocal than in any of the cases where such a construction had been adopted. *Pinbury v. Elkin* and *Roe v. Jeffery*, were anomalous cases, and, perhaps, would hardly be followed at the present day; but even if their authority were admitted, they could not govern the case before court. The cases of *Blackborn v. Edgley*,<sup>(d)</sup> *Ginger v. White*,<sup>(e)</sup> *Malcolm v. Taylor*,<sup>(g)</sup> and *Murray v. Addenbrook*,<sup>(h)</sup> had no application, as they all depended upon the very special frame and wording of the particular wills from which the court had collected in those cases that the death without issue there spoken of, was to be intended a death without such issue as would have taken by force of the prior limitations.

Here the gift over, if Caroline died without lawful issue,

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| (a) <i>Burford v. Lee</i> , 2 Freem. 210, and | (d) 1 P. Wms. 600.           |
| Anon. <i>ibid.</i> 287.                       | (e) <i>Willes</i> , 348.     |
| (b) 1 Bro. C. C. 187.                         | (g) Page 416, <i>infra</i> . |
| (c) 17 Ves. 479.                              | (h) 4 Russ. 407.             |

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was to the testators' nephews and nieces living at the \*time—living, that is, at the time of the failure of her [\*401] lawful issue. That limitation was certainly too remote; for, as it was descriptive of a class in terms large enough to include all after-born children of the testator's brothers and sisters, it would, if it were allowed to operate, suspend the time of vesting beyond the period of lives in being, and possibly, also beyond a period of twenty-one years afterwards; *Jee v. Audley*, (a) *Leake v. Robinson*, (b) *Bull v. Pritchard*, (c) *Palmer v. Holford*. (d) The illegitimacy of Caroline Harding would not affect the question, because, in the settlement which the testator directed to be made in the event of her marriage, he anxiously provided for her issue.

Mr. *Spence* appeared for the defendants Mr. and Mrs. *Pulman*.

Mr. *Twiss*, in reply.

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*July 26th.*—THE LORD CHANCELLOR (after stating the material clauses of the will) proceeded as follows :

The question here is, that which so frequently arises in cases touching executory devises of this description, whether the limitation over "to my nephews and nieces" is a limitation upon a general failure of issue of the daughter, or whether it is a limitation over upon a failure of issue at a given time, namely, at her decease; that is to say, whether the words are to be read, "if my daughter die without issue" generally, or are to be read, "if she die without issue living at the time of her death." In the one case, had the subject been realty, an \*estate [\*402] tail would have been created; consequently there would be in the immediate taker, it being personalty, an absolute interest, discharged of all the limitations over; in the other case there

(a) 1 Cox, 324.

(b) 2 Mer. 363.

(c) 1 Russ. 213.

(d) 4 Russ. 403.

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would have been no estate tail in the first taker had it been realty; and it being personalty, there would be an estate given to the first taker absolute in point of form, but subject to a good limitation over, operating by way of executory devise. The Vice-Chancellor held that the words were to be taken without qualification, and as importing a general failure of issue, not issue failing at a given time.

His Honor is said to have mainly relied upon two decisions in Freeman,<sup>(a)</sup> where the general case occurs in its most abstract and naked form. These have now become leading authorities upon this difficult and somewhat various branch of the law; they have been uniformly followed, and they may be said to have settled the law, where there is no restrictive circumstance to create an exception.

The question here, however, is not whether, if this had stood alone (as in *Burford v. Lee*) "to my daughter Caroline, and in case of her death without issue," then over, that would mean a general failure of issue, or a failure by leaving no issue living at the time of her death; but whether there is nothing in this particular will which, taking the whole instrument together (but more especially taking this particular portion of it together), makes the case an exception from the general rule, a rule as well settled, both as to real and personal estate, as anything known in the law.

It may be laid down as an undeniable proposition, the result to be collected from the very numerous cases on the  
[\*403] \*subject, that, in regard to these executory devises, a distinction has been taken between real and personal estate; and that though, where the words occur without qualification, the leaning would, in construing a devise of real estate, be towards a general failure of issue, in favor of the heir at law, there is no such leaning where the property is merely personal;

(a) *Burford v. Lee*, Freeman. 210, and Anon. ib. 287.

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the court having in the latter case been rather astute and anxious to catch at any circumstances appearing on the will itself which may restrict the failure of issue to the period of the death of the first taker. The question then comes to be, whether—regard being had to the principles recognized in those cases where a limited instead of general failure of issue has been held to be the true construction, and regard being also had to the frame of the present bequest, or perhaps I might say of the whole instrument together—whether this case comes within any of these authorities, or the principles to be gathered from them. My original impression was, that none of the cases came up to the present, and that if I were to decide for the restricted instead of the general and indefinite sense, thereby giving effect to the bequest over, I should be going a good deal further than they warranted; and the result of further consideration is confirmatory of my first opinion.

It is to be observed in the outset, that although doubts have been thrown out at different times in Westminster Hall touching the correctness of Lord Macclesfield's distinction<sup>(a)</sup> between real and personal estate, his Lordship holding that the words "without leaving issue" were to be taken as referring to a general failure in a devise of realty, and in the restricted sense, as referring to the leaving issue at the time of the death, \*in a bequest of personalty; and although those doubts [\*404] have been sanctioned by judges no less eminent than Lord Thurlow and Lord Kenyon, the great authority of Lord Eldon, in *Crooke v. De Vandes*, tends to restore the weight due to the authority of *Forth v. Chapman* upon this point. In *Crooke v. De Vandes*<sup>(b)</sup> Lord Eldon says: "When I read the case of *Porter v. Bradley*,<sup>(c)</sup> speaking with all due deference to the learned judge who expressed that *dictum*, it appeared to me that it went to shake settled rules to their very foundation. I had heard the case of *Forth v. Chapman* cited for years, and repeatedly by Lord

(a) In *Forth v. Chapman*, 1 P. Wms. 663. (c) 3 T. R. 148.

(b) 9 Ves. 197.



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Kenyon himself, as not to be shaken. I never knew it shaken; and if *Porter v. Bradley* has not been since disturbed in the Court of King's Bench, upon the principles expressed by Lord Alvanley in *Campbell v. Campbell* against shaking settled rules, I will not add to the authority of that *dictum*." Lord Kenyon's observation, though merely *obiter dictum*, broke in considerably upon the distinction with respect to the effect of the word "leaving" as applied to real and personal property; and there is no doubt, also, that the judgment in *Roe v. Jeffery*,<sup>(a)</sup> which was a question touching a devise of real estate, and in which that *dictum* was much relied upon, tended still more to shake the distinction laid down by Lord Macclesfield in *Forth v. Chapman* with respect to the different operation of the word "leaving" as applied to cases of real and of personal property.

To the first class of cases in which the general words "dying without issue" have been taken in a restricted sense, belongs the case of *Nichols v. Hooper*,<sup>(b)</sup> where the gift was to B. [\*405] for life, remainder to C. and his heirs; \*but if C. should die without issue of his body, then the testator gave 100*l.* apiece to his two nieces, to be paid within six months after the death of the survivor of B. and C. The language of this bequest clearly indicates the plainest intention that there should be a limitation to the period when the gift over was to take effect, inasmuch as something was to be done upon that failure—a sum of money was to be paid within six months after the decease of the first takers; a circumstance distinctly showing that the contemplation of the parties was confined to a failure of issue at the death of the first and second takers, and excluding the operation of the general rule.

Another class of cases is similar to *Target v. Gaunt*.<sup>(c)</sup> That was a bequest of a term to A. for life, and no longer; and after his decease, to such of his issue as he should by will appoint; and in case he should die without issue, remainder over. Now,

(a) T. R. 589.

(b) 1 P. Wms. 198.

(c) 1 P. Wms. 432.

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the circumstance that the bequest was to go in remainder to such issue as he should by his will appoint, was a strong indication that the legatee over was to be some person of whom A. was cognizant, some person, therefore, *in esse* during his lifetime, and consequently limiting the generality of the words.

Next come cases of the same description as *Hughes v. Sayer*,<sup>(a)</sup> and *Nicholls v. Skinner*,<sup>(b)</sup> which are substantially the same, where the gift was, "if A. or B. die without issue, then to the survivor;" and where the circumstance that the legatee over was to be one of the individuals for whose lives the whole had been previously limited, was considered restrictive and inconsistent with the notion of a perpetuity.

\*To the fourth class, which, in one of those points, [\*406] resembles the others, belongs *Pinbury v. Elkin*,<sup>(c)</sup> which was a bequest to A., and if she die without issue, then after her decease 80l. to remain to the testator's brother. The same principle was by implication recognized in *Paine v. Stratton*,<sup>(d)</sup> where, if the interlined words, "after her death," had not been afterwards scored out, and ultimately determined to form no part of the will, they would, it seems, have been held sufficient, on the authority of *Pinbury v. Elkin*, to restrict the generality of the expression. The *dictum* of Lord Hardwicke, in *Theebridge v. Kilburne*,<sup>(e)</sup> that the words "immediately from and after the decease," were too precarious a foundation for the restricted construction, appears certainly at variance with the decision in *Pinbury v. Elkin*; but the observation was entirely extra-judicial, and is therefore less deserving of attention.

The last class of cases referred to is the most important and most general; those, I mean, where, from the terms of the de-

(a) 1 P. Wms. 534.

(b) Prec. Ch. 528.

(c) 1 P. Wms. 563.

(d) 2 Atk. 647, 3 Bro. P. C. 99, Toml. edition.

(e) 2 Vea. sen. 233.

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vise with reference either to the subject matter of the gift, or to the extent of interest given to the devisee or legatee over, a presumption is necessarily raised, inconsistent with the construction of an indefinite failure. If, for instance, the estate which the testator is dealing with be an estate held *pur autre vie*, it is impossible that the gift over, after a general failure of issue, can tend to a perpetuity. If an estate held for the life of A. and B. be devised to C. for his life, and if he shall die without issue in the most general form, then over to D., it is perfectly clear that the limitation over must vest in D., according to the strict rule of law, within the compass of lives in being.

[\*407] \*The other and more usual case is, where a restriction is raised from the nature of the estate given by the limitation over; as where, for example, the interest given over is an estate for life or lives, that circumstance imports such a restriction, and raises a presumption in favor of the words meaning issue living at the time of the death, which thus prevents the perpetuity. I state this proposition with diffidence, because it appears to be somewhat at variance with the doctrine laid down by Sir W. Grant in *Barlow v. Salter*,<sup>(a)</sup> although the case with which he was there dealing was that of a gift to survivors absolutely, and not merely of life estates, and in that respect differed from the class I am now considering. In *Barlow v. Salter* Sir W. Grant says, "If there is any case which has ascribed to the circumstance of a devise over for life the effect here contended for [the effect, that is, of confining the failure of issue to the death of the prior devisee], I must beg leave to doubt the soundness of the decision. The case of *Roe on the demise of Sheers v. Jeffery*,<sup>(b)</sup> certainly gives no countenance to that doctrine, as the devise over was only of life estates: and on that ground Lord Kenyon compared it to *Pells v. Brown*."<sup>(c)</sup>

The cases at law, however, leave no doubt that the character of the devise over, as being an estate for life only, has been im-

(a) 17 Ves. 479.

(b) 7 T. R. 589.

(c) Cro. Jac. 590.

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ported into the consideration of the question of construction, and that it furnishes a fifth head of exception to the general rule. *Roe v. Jeffery*, which was a case argued with his wonted ability by Sir Samuel Romilly, was clearly decided upon special grounds. That was a devise to A. for life, with remainder to B. and his heirs; but in case B. should die, and leave no \*issue, then the premises were to be and return unto E., [\*408] M. and S., or the survivor or survivors of them, equally to be divided. Upon this, three things may be observed: first, the word "leave" occurs; if he die and leave no issue—an expression which, had the subject been personal estate, would, upon the authority of *Forth v. Chapman*, have at once decided the question; and which, notwithstanding the well settled distinction between real and personal property in that respect, was much relied upon by Lord Kenyon in his judgment. The next circumstance distinguishing *Roe v. Jeffery* is survivorship, which brings it within the class of cases already adverted to, such as *Hughes v. Sayer*, and *Nicholls v. Skinner*. A third circumstance also exists, upon which the courts mainly rely—the circumstance of the devisees over taking mere life estates; for in the executory devise to E., M. and S. there are no words of inheritance. Upon these grounds, separately and together, the court held the limitation over in *Roe v. Jeffery* to be a good executory devise.

*Keily v. Fowler*,<sup>(a)</sup> decided in the House of Lords, is a case by itself, and so very peculiar in its character, that it cannot form a rule, or be ranged under any of the classes referred to. It appears to have proceeded entirely upon its own circumstances, and cannot, therefore, be considered as breaking in upon the general rule. The court there as it appears from the report, as well as from the language of Lord Thurlow and Lord C. J. Wilmot, laid hold of all the circumstances, but most particularly the circumstance of its being a personal trust, the duties imposed on the executors strongly implying a *delectus personarum*: the very peculiar form of the direction that the property should

(a) 3 Bro. P. C. 299, Toml. ed. Wilmot's notes, 298.

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[\*409] return \*back to the executors in order to be divided, and the nature of the chattels to be given to the daughter, viz., twenty cows and one horse, in the event of the limitation over taking effect, were also material features in the case; and from all these circumstances and expressions taken together, the court considered itself justified in holding, that the failure of issue must be intended to be confined to the period of the life of the first taker. This is the mode in which Mr. Fearne understood and explained that decision; although it seems not to have been satisfactory to Lord Thurlow, who, in afterwards commenting upon the case in *Bigge v. Bensley*,<sup>(a)</sup> is reported to have said, "It would be better sense to say, that in *Keily v. Fowler* there was no rule of construction than Mr. Fearne's rule." Another version of Lord Thurlow's dictum is, however, extant, at which Mr. Fearne had no occasion to take offence, and which represents his Lordship as having only said, "There is no other rule than Mr. Fearne's." But Mr. Fearne appears not to have seen the latter version, and the fancied disapprobation of Lord Thurlow drew from him, in the last edition of his treatise, an additional passage, in which he vindicates the reasoning he had previously adopted.

With respect to *Blackborn v. Edgley*,<sup>(b)</sup> I may observe that it seems to have little or no bearing on the case before the court; the question in discussion there relating to a proposition now thoroughly established, that it makes no difference whatever, whether the words give an express estate tail, or an estate tail by implication.

Upon a review of all the cases, I am satisfied that no  
 [\*410] authority can be found for going beyond the \*devise itself, taking all its parts together. I will not be stopped by a colon or a period: if the next succeeding sentence is manifestly a substantial part of the bequest, I shall treat it like an Act of Parliament, which has no stops, and read it as a part

(a) 1 Bro. C. C. 187.

(b) 1 P. Wms. 600.

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of the bequest; but I will not go into another branch of the will for the purpose of showing a general intention. Of what use is it to look at intention in these cases? Did any man ever make a will in which he wished that an executory devise should fail? The very making of this will shows the contrary. In *Burford v. Lee*(a) the testator no doubt intended, and was desirous, that the estate should upon certain events go to the devisee over. His intention that the ulterior limitation should take effect, was just as plain as if he had used the words "living at the time of the first taker's death:" but a limitation after the failure of issue generally is an intent not sanctioned by the law: it would tend, were it effectuated, to create a perpetuity by suspending the vesting of the ulterior estate for a period exceeding lives in being and twenty-one years further; and for that reason, and not with reference to intention, it is not permitted.

I have stated that the court is bound to look to the particular devise, and not to travel out of it in order to find circumstances for restricting the generality of the terms in which the executory gift over is limited. The testator has here said that in case of Caroline's death without lawful issue, he *then* wills the money to be divided so and so, and reliance is placed upon the word "then." But in *Beauclerk v. Dormer*(b) it is expressly laid down by Lord Hardwicke that though the word "then" in the grammatical sense is an adverb of time, yet in limitations of estates and framing contingencies \*it is a word of reference, [411] and relates to the determination of the first limitation in the estate, when the contingency arises. Used in this way, "then" is a particle of inference connecting the consequences with the premises, and meaning "in that event" or "if that happens." It is therefore a word of reasoning rather than of time, and it is so to be understood here. In *Jee v. Audley*,(c) where some stress was laid upon the word "then," the expression was applied in a very different way; for the property was directed to be equally divided among the children of C. "then

(a) 2 Freem. 210.

(b) 2 Atk. 308.

(c) 1 Cox, 324.

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living;" and this accordingly brings me to the latter clause here, in which the fund in the specified event is directed to be divided between the testator's nephews and nieces who may be living "at the time." Now I do not think the expression "at the time" carries the case further than the word "then," understanding that word in its grammatical sense as referring to and marking time. The question still remains behind, at what time? Is it "at the time of the death (in whatever event it happens) of the first taker?" or is it not rather "at the time of the death of the first taker without issue?" I say that upon the authorities it is to be taken to be "at the time of the death without issue." "At the time" is of itself an elliptical phrase which recognizes something to be understood; and where there is an obvious ellipsis, the *subintellectum* must be collected from what occurs before: here the antecedent is "dying without issue." If that is to be construed "dying without issue at the time of the death," the expression "at the time" in the subsequent clause may mean "living at the time of the death:" but it is unnecessary to import these latter words, the meaning of the first limitation having been already ascertained without supplying them. If, [\*412] on the other hand, the \*dying without issue is to be a dying without issue generally, then, by a parity of reasoning, the words "at the time" in the subsequent clause must refer to the words "dying without issue" generally, and the question is immediately determined the other way. It is, therefore, impossible, according to any fair principle of construction, to carry the case further upon the expression "at the time" than upon the word "then" used as an adverb of time. The question then resolves itself into this—ought that expression to be construed as referring to the time of the deceased, or to the time of the failure of issue; and that again brings us round to the point from which the inquiry originally set out, that is to say, to the construction to be put on the clause of gift itself. \*Indeed it is only by a *petitio principii*, or something very like it, that the least shadow of argument can be founded on the expression "living at the time," and that only by importing it into the clause from a subsequent part of the will.

Next, if Caroline marries—I pass over some intermediate gifts, which are immaterial—“if she marries, it must be with their consent, and the property to be solely settled upon herself and children, and in no way changed or alienated.” Assuming this to be equivalent to a direction that the property shall be settled for her separate use, and afterwards for her children, I do not find that it alters the case. The testator is contemplating and providing for the event of his daughter's marriage. In that event he requires the fund, to be settled upon her and the children of the marriage, to be for her sole use, so as to exclude the debts, engagements and control of the husband during coverture; and subject to her interest, in case she comes under marital authority, it is to be settled upon the children. But there still remains one case unprovided for, as to which \*the [\*413] question would be—what was to take place, not in the event of her marriage and having no issue (for the settlement would provide for that), but in the event of her not marrying? and that brings us round to the other point, and leaves the case exactly where it stood before.

To consider next the effect of the bequests to other persons: for instance, “to Charlotte Ann Harding, my niece, daughter of my late brother Francis, the sum of 3,000*l.*, but in case of her death without issue this 3,000*l.* to revert back, and to be divided betwixt my nephews and nieces who then may be living.” The expressions here by no means come up to those which are to be found in *Keily v. Fowler*,<sup>(a)</sup> where the subject of the gift was to *return back* to those identical *personæ delectæ*, the executors, and was to be actually provided, in terms clearly contemplating and expressing a desire that it should revert to them personally. That, however, is not the consideration now; nor am I at liberty to import it into the present question; for if the construction with respect to the limitation over, in the event of Charlotte's death without issue, had been clearly the other way—if that had been a good limitation to the nephews and nieces, it would have

(a) 3 Bro. P. C. 299, Toml. ed.



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been so in consequence of the difference in the words used. If a man uses one form of expression in one part of his will, and a different form in another, the ordinary rules of construction would incline me to believe that he had a different meaning in the two cases. But, be that as it may, it is a consideration into which I cannot enter; for it has nothing to do with the bequest which I am now called upon to construe.

[\*414] \*I have read through the rest of this will, but it is quite clear that nothing turns upon any other part of it; and my opinion upon the whole is, that the gift over to the nephews and nieces is void as an executory bequest, and that the absolute interest in the fund vests in Caroline, the first taker.

It is said she was a natural daughter; but I cannot perceive how that circumstance should at all affect the question of construction, upon which, as I have already observed, considerations of probable intention have no bearing whatever. Of course the testator never wished or intended that the crown should take; it is clear he would have wished to prevent the crown from taking in the event of Caroline dying, and for that purpose, to enable her to dispose by will of the personal estate: and she has accordingly made a will which defeats the rights of the crown. Nevertheless, whatever might have been his acts, and whatever his intent, if that circumstance had been present to his mind, it is clear it cannot now be taken into account, for it is a fact which is entirely independent of the will.

Mere presumption of intention, drawn from extrinsic circumstances, unless some expression of the intention be found in the instrument itself, is of no value; and, beyond mere presumption, there is nothing here which can control the legal effect of the clause constituting the substance of a gift to Caroline. Whatever expressions may occur in other parts of the will, inconsistent with and independent of that particular gift, I strongly incline to think that the court is not entitled to pay regard to them: but I wish it to be understood that, even if I were at lib-

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erty to range over the whole instrument, no such indications of intention are to be found. Nor have I been able to \*discover any cases, either at law or in equity, in which \*[415] the court has gone out of the devise itself. If, however, any such cases exist, they would not have the slightest bearing upon the decision of this particular question, though they might break in upon the general rule to be gathered from the authorities, that in giving a construction upon the bequest, the court is to confine itself to the words which constitute and contain the body of the gift.

For these reasons the decision of his Honor must be affirmed; but it is not a case for costs.

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This case was afterwards carried by appeal to the House of Lords, under the name of *Candy v. Campbell*; where the judgment of the Lord Chancellor was affirmed on the 19th day of June, 1834.

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## \*MALCOLM v. TAYLOR.

[416]

ROLLS.—1831: 23d June, 5th, 8th and 19th July. L. C. 20th and 21st December. 1832: 10th March.

Where real and personal estates are given together for life, and so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal estate at twenty-one being a son, or at twenty-one or marriage, being a daughter, and there is a gift over in the event of the tenant for life dying without issue, it is to be intended a dying without such issue as would take by force of the prior limitations.

A testatrix, after bequeathing divers annuities and legacies, and, amongst others, a sum of stock to M. M. to vest at twenty-one or marriage, devised and bequeathed a West India plantation, and all the residue of her money in the funds, after payment of the annuities and legacies thereinbefore bequeathed, and also her plate, books and certain portraits, to E. G. T. and M. T. for their lives equally, and after the death of either, the whole to the survivor for life, and after the decease of the survivor, then unto such children of M. T. as she should by deed or will appoint;

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and in default of appointment, then the plantation and the residue of the money in the funds to be equally divided among the said children and their heirs; and if but one child, the whole to such child and his or her heirs, the funded property to be an interest vested in them, being sons, at twenty-one, and being daughters, at twenty-one or marriage; but in case M. T. should die without issue of her body lawfully begotten, the testatrix devised the plantation equally among all the children of A. W. and their heirs; and she bequeathed her said residue of her money in the funds, and all her said plate, books and portraits unto J. M. for life, and after his decease to his eldest son forever. All the rest and residue of her estate and effects the testatrix gave and bequeathed unto E. G. T. and M. T. absolutely. M. T. having survived E. G. T. and died without having been married, it was held, that J. M. took a life interest in the funded property; that J. M. took no interest in the plate, books and portraits, the limitation over of those articles being too remote; that the stock legacy to M. M., which had lapsed by her death under age and unmarried, passed under the residuary bequest of the funded property, for the benefit of J. M., and did not sink into the general residue.

MARTHA TAYLOR, spinster, being seised in fee of an interest in a moiety of the Lysons Plantation, in the island of Jamaica, with the slaves and stock thereupon, and being also possessed of a large personal estate, by her will, which was duly executed and attested, after giving divers specific legacies to her mother Dame Elizabeth Goodin Taylor, her sisters Anna Susanna Watson Taylor and Maria Taylor, and to other persons, gave and bequeathed as follows: "Also I give and bequeath the sum of 5,000*l.* sterling to my mother, the said Elizabeth Goodin Taylor, and a [\*417] like sum \*of 5,000*l.* to my sister, the said Maria Taylor: and I give and bequeath the sum of 500*l.* to the said Anna Susanna Watson Taylor, to be laid out in some remembrance of me. I also give and bequeath the sum of 1,000*l.* to Simon Watson Taylor, eldest son of my said sister, Anna Susanna Watson Taylor, to purchase a piece of plate in remembrance of his late uncle and godfather, my dear brother. I also give the sum of 50*l.* a piece to my uncle Neil Malcolm and to his wife Mary Ann Malcolm, to be laid out in remembrance of me, as a trifling mark of my esteem; and to each of their four children, namely, Neil Malcolm, Elizabeth Mary Malcolm, Mary Malcolm and David Orme Cuthbert Malcolm, I give the sum of 20*l.* to purchase some small remembrance of me; and I give and bequeath to their third son, and my brother's godson, John Malcolm,

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the sum of 3,000*l.* for his own absolute use and benefit, to be paid to and be an interest vested in him on his attaining his age of twenty-one years, and to be accumulated for him in the meantime at compound interest. I also give and bequeath to Mary Ann Martha Malcolm, third daughter of the said Neil and Mary Malcolm, the sum of 2,000*l.* for her own use and benefit, to be paid to and be an interest vested in her on her attaining the age of twenty-one years or being married, whichever shall first happen, and in the meantime to be accumulated for her at compound interest." The testatrix then gave a number of pecuniary legacies to some of her more distant relatives and connections, and to servants, and continued thus: "And I give, devise and bequeath my share or portion, right and interest of and in the moiety of Lysons Plantation or estate in the island of Jamaica, and the slaves, cattle and stock thereupon and thereunto belonging, and also all the residue and remainder of my money in the funds, after payment of the annuities and legacies hereinbefore bequeathed, and also all \*my plate, books and the portraits [\*418] of my father, brother and uncle Simon Taylor, unto and to the use of the said E. G. Taylor and Maria Taylor, and their respective assigns for the terms of their natural lives, share and share alike, and after the death of either of them then unto the survivor of them and her assigns for her life: and I will and direct that the estate, share and proportion of the said Maria Taylor shall be for her own sole use and benefit, separate and apart from any husband she may hereafter marry; and her receipts alone to be sufficient discharges for the produce, profits, interest or dividends thereof; and after the decease of the survivor of them, the said E. G. Taylor and Maria Taylor, unto such of the children of the said Maria Taylor as she shall by any deed in her lifetime, or by her last will and testament duly executed and attested in the presence of three or more witnesses, direct or appoint; and in default of such direction or appointment, and as far as the same shall not extend, then I will and direct that my said share or portion of the moiety of Lysons Estate and the said residue of my money in the funds shall be equally divided between and among the said children, share and share alike, their

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heirs and assigns, and if but one such child, then the whole to such one child, his or her heirs and assigns; the funded property to be an interest vested in and paid to them or the survivors or survivor, being sons, at twenty-one, and being daughters, at twenty-one or marriage: and in case the said Maria Taylor shall die without issue of her body lawfully begotten, then I give, devise and bequeath, after the decease of the survivor of them, the said E. G. Taylor and Maria Taylor, my said portion of the moiety of the Lysons Estate unto and among all and every the children of the said Anna Susanna Watson Taylor and to their heirs and assigns, equally to be divided between them, [\*419] share and share alike; and in case the said Maria Taylor shall die without issue as aforesaid, I then give and bequeath (after the death of the said E. G. Taylor and Maria Taylor) the said residue of my money in the funds, and all my said plate, books and portraits of my father, brother and uncle, unto the said John Malcolm and his assigns for his life; and after his decease, I give and bequeath the same to his eldest son forever. But in case the said John Malcolm shall die under age and without issue, I then give and bequeath the said residue of my said money in the funds, plate, books and portraits unto the said Mary Ann Martha Malcolm absolutely: but the said plate, books and portraits, shall after her decease go to her eldest and other sons or children in succession, so far as the rules of law and equity will permit, by way or in nature of heirlooms; yet, nevertheless, so that the same shall not vest absolutely in any person or persons, until he, she or they respectively shall attain or have attained the age of twenty-one years, or dying under that age, shall leave issue of his, her or their body or respective bodies. And all the rest, residue and remainder of my estate and effects, real, personal and mixed, I give, devise and bequeath unto the said Elizabeth Goodin Taylor and Maria Taylor, their heirs, executors, administrators and assigns, equally to be divided between them, share and share alike: and I nominate, constitute and appoint the said E. G. Taylor and Maria Taylor, joint executrices of this my last will and testament."

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The testatrix died in the year 1817. Maria Taylor survived Elizabeth Goodin Taylor, and died without having ever been married. Mary Ann Martha Malcolm died in the year 1828 under age, and unmarried. The present bill was filed by John Malcolm, who had come of age, but had not married, against Anna Susanna \*Watson Taylor, and her husband, Mr. Watson Taylor, as representing the estates of the testatrix, and of Elizabeth Goodin Taylor and Martha Taylor, and against all other parties claiming interests under the will.

The main question in the cause was, whether in the events which had happened, the plaintiff was entitled to the residue of the testatrix's money in the funds, and to the plate, books and portraits; and if he was, whether he took an absolute interest, or a life estate only, in these two several descriptions of property. For the plaintiff it was argued, that the word issue was to be understood in a restricted sense, as meaning children; or that it was to be intended as issue living at the death of Maria Taylor.

The defendant, Mrs. Watson Taylor, claimed to be entitled to the property, upon the ground, that by the dying without issue, the testatrix contemplated a general failure of issue of Maria Taylor, and that the limitation over to the plaintiff in that event was too remote. The same questions were also raised in a cross suit of *Taylor v. Malcolm*, which was brought on for hearing together with the original suit.

The case was very fully argued by Mr. *Bickersteth*, Mr. *Miller* and Mr. *Hodgkin*, for the plaintiff; and by Mr. *Pemberton*, Mr. *Spence*, Mr. *Preston*, Mr. *J. B. Parry*, and Mr. *W. Russell*, for the different defendants.

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*July 5th.*—THE MASTER OF THE ROLLS:—As applied to the real estate, the expression “dying without issue” is to be construed a dying without having had issue, because, as a child of

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Maria Taylor would take a vested interest upon its  
[\*421] birth, the limitation \*over can have no other object  
than to provide for the failure of children.

With respect to the funded property, a child of Maria Taylor would not take a vested interest at its birth; nor until, being a son, it attained twenty-one, or, being a daughter, it attained twenty-one or married; and the expression "dying without issue" cannot, as to this property, be construed a dying without having had issue, because although Maria Taylor had a child born, the limitation over might still take effect by the death of such child before it attained twenty-one, being a son, or, being a daughter, before it attained twenty-one, or married. Neither can the expression be construed a dying without issue living at the death, because, although a child of Maria Taylor were living at her death, the limitation over might yet take effect by the death of the child before it acquired a vested interest. The expression "dying without issue," as applied to the funded property, must, therefore, either mean a dying without such issue as would take by force of the prior limitation, or a general failure of issue. It is a reasonable intendment, that a subsequent limitation is meant to take effect upon failure of the prior gift, and is a substitution in that event. This is the plain intention of the testatrix with respect to the real estate; and it is to be supposed, where real and personal estate are given together, that the testatrix had the same intention with respect to the funded property and the real estate. The objection to this construction is, that if a son married and died under twenty-one, leaving a child, such child would take nothing; and I agree that it is probable, that if the possibility of such an event had occurred to the testatrix she would have provided for it; and the inquiry then is, whether the testatrix used the words "dying without  
[\*422] issue" in order to provide for \*that event, or whether, that event not being in her contemplation, she could not mean to provide for it.

It is reasonable to infer, that if she had contemplated that

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event, she would have provided for it in express terms by vesting the property in sons on their marriage, as she has done in the case of daughters. It appears to me, that the true answer to the objection is, that it not being usual for sons to marry under twenty-one, the testatrix did not contemplate, and her will has not provided for that event; but it being usual for daughters to marry under twenty-one, the testatrix therefore, contemplated and has provided for that event. Upon the whole, therefore, as to the funded property, I am of opinion that I shall best advance the expressed intention of the testatrix, by holding the limitation over to mean, not a general failure of issue, but a failure of the children for whom the prior gift was intended.

With respect to the plate, books, and portraits, it is manifestly a gift to Maria Taylor for life, with a remainder over on her dying without issue; and there is no intermediate gift. This is either too remote as meaning an indefinite failure of issue, or is an estate tail by implication in Maria Taylor; and in either case the plate, books, &c., belong to Mrs. Watson Taylor.

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*July 8th and 19th.*—The cause having stood over to a subsequent day, in order to be further discussed upon other points, a subordinate question then raised and argued was, whether the stock legacy of 2,000*l.*, which had lapsed by the death of Mary Ann Martha Malcolm under age and unmarried, passed to the plaintiff under the residuary bequest of the testatrix's money in the funds, or formed part of the general residue of her property, belonging therefore to her residuary legatees.

\*His Honor said that in his opinion the stock in [\*423] question was given to Mary Ann Martha Malcolm, as a charge upon the residue of the testatrix's money in the funds; and that being the case, inasmuch as the legacy had lapsed by the death of the legatee under age and unmarried, it must be held to pass under the gift of that residue to the plaintiff.



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By the decree it was, among other things, declared, that according to the true construction of the will of the testatrix, the plaintiff, John Malcolm, upon the death of Maria Taylor, became entitled for his life to all the residue and remainder of the testatrix's money in the funds after payment of the legacies and annuities thereby bequeathed; and that such legacies and annuities were exclusively charged on the money in the funds in exoneration of the testatrix's personal estate; and that the plate, books and portraits therein mentioned, became and were the absolute property of the said Maria Taylor, and that the same now belonged to the defendants, her legal personal representatives; and that by the death of Mary Ann Martha Malcolm under age and without having been married, the legacy of 2,000*l.*, bequeathed to her by the said will, lapsed for the benefit of the legatee of the residue of the said testatrix's money in the funds, &c.

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The plaintiff and the defendants presented cross petitions of appeal against his Honor's decree.

Sir *E. Sugden*, Mr. *Knight*, Mr. *Miller*, and Mr. *Hodgkin*, for the plaintiff, John Malcolm.

[\*424] \*The main question is, whether in the event that has happened of Maria Taylor dying after her mother, and without having had children, the bequest of the funded property, and of the plate, books and portraits to John Malcolm is effectual. With reference to the money in the funds, that question must depend on the answer to another, whether the words introducing the gift over are such as to render the ulterior limitation over too remote. The testatrix gives her West India estate and the residue of her money in the funds to the children of Maria Taylor, as she shall appoint; children and they alone being the objects of her bounty. She next provides for the case of there being no appointment, upon which, as to the land, no doubt can arise; for the only term used is children, and under the language of the clause, children, had they come into *esse*, would have

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taken a fee simple at the moment of their birth. With respect to the stock, the provision (though for the purpose of effecting precisely the same intention) was necessarily different, in consequence of the different nature of the subject matter. The direction there is, that the property shall not become vested in the children, unless, if sons, they attain twenty-one, or if daughters, they attain that age or marry. When the testatrix directs, that in case Maria Taylor shall die without issue of her body lawfully begotten, the West India plantation shall go among the children of Mrs. Watson Taylor, she can have but one intelligible meaning, viz., that in case Maria Taylor dies without the issue provided for by the preceding limitation, in other words, without having had children (in whom, under the words of the prior devise, a fee simple in the plantation would have vested at their birth), then, and then only, the subsequent and alternative limitation to the family of Mrs. Watson Taylor shall have effect. The testatrix never looked beyond the first line of devisees. If that line did not come into *\*esse*, she nominated another to take in their stead; but as the two were not to take successively, she has used no expression importing devolution or descent. The children of Maria Taylor, if they took at all, were to take absolutely; if their interest never arose, the property was to go over, not by way of succession, but substitution, to other parties. To the clause which immediately follows respecting the funded property, the same rule of interpretation must necessarily be applied: "and in case Maria Taylor shall die without issue as aforesaid, I then give and bequeath, after the death of E. G. Taylor and Maria Taylor (taking it for granted that the event would happen, if at all, upon the death of those two ladies), the said residue of my money in the funds, &c., unto the said John Malcolm." Plainly the words "without issue as aforesaid" can only refer (as in the case of the real estate) to such issue as would, under the prior or aforesaid limitations, take the money in the funds, and the death spoken of must be a death without children attaining twenty-one, if sons, or attaining twenty-one or being married, if daughters. [\*425]

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The intention, as to the real estate and the stock, must have been exactly the same. The two were to go together to the same class of persons; and accordingly the effect though not the language of the gift over, is identical in the two cases; for after a limitation, which would vest the plantation and the money in the funds in all the children absolutely, the former at their birth, and the latter at their majority or marriage, the property in both is given over, in case Maria Taylor shall die without issue capable of taking those respective descriptions of property. Such as applied to the money in the funds, is the natural and only rational construction of the words "issue as aforesaid," that is, issue before designated as the objects to take an absolute and vested interest in the subject matter of the bequest. The words "as aforesaid" are in this view most significant; for, literally construed, they impose an express restriction on the generality of the death without issue, on which the ulterior limitation depends, of necessity confining it to the failure of that class of issue to whom, in the prior clause, the money in the funds had been bequeathed. In the devise over of the real estate those words are wanting, because, the first devise being to children in fee, they are unnecessary; whereas, in the bequest of the money in the funds, which was only to vest in children on a specified event, they were indispensable, and were purposely introduced in order to keep the two species of property together and in the same course of devolution.

Even if the words "as aforesaid" had been omitted, the death of Maria Taylor without issue must, consistently with the authorities, have been construed a death without such issue. By reading the words literally, all the subsequent limitations would be destroyed: a whole class of legatees for whom the testatrix meant to provide would be disappointed; while another class, for whom certainly she had no such intention, namely, children who died under twenty-one and unmarried, would be let in. The expression "death without issue," occurring as it does here, would, as applied to real estate, unquestionably import a failure of children, and not of issue generally; nor can any case be pro-

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duced in which, after a gift which would carry a fee simple to children, the devise has been afterwards cut down to an estate tail upon the effect of the word "issue." In *Doe v. Perryn*,<sup>(a)</sup> which was afterwards confirmed in *Rex v. Marquis of \*Stafford*,<sup>(b)</sup> the words "in default of such issue," following a devise to children and their heirs, were held to be equivalent to "in default of such children;" and the same principle had been previously recognized in *Ginger v. White*,<sup>(c)</sup> and in *Goodright v. Dunham*.<sup>(d)</sup> The rule is equally applicable to limitations of personal as of real estate, where the intention manifestly requires, and the words, as here, are without violence susceptible of such a construction. *Doe v. Lyde*,<sup>(e)</sup> *Blackborn v. Edgley*,<sup>(g)</sup> *Maddox v. Staines*,<sup>(h)</sup> *Sheffield v. Lord Orrery*,<sup>(i)</sup> *Wilkinson v. South*,<sup>(k)</sup> *Salkeld v. Vernon*,<sup>(l)</sup> a case on all fours with the present; *Vandergucht v. Blake*,<sup>(m)</sup> *Hockley v. Maubey*,<sup>(n)</sup> *Bell v. Phyn*,<sup>(o)</sup> *Morse v. Lord Ormonde*,<sup>(p)</sup> *Murray v. Addenbrook*,<sup>(q)</sup>

Exactly the same reasoning applies to the bequest of the books, plate and portraits. His Honor, indeed, considered that as to them the gift over to the plaintiff was void for remoteness. In deciding upon the bequest of the funded property, he confined the default of issue of Maria Taylor, as if it had been in default of *such* issue, on the ground that that property in the preceding part of the will was given expressly to the children in certain events; but that as the will contained no direct gift of the plate, books, &c., it supplied nothing upon which as to them the default of issue could be referred for the purpose of being restricted. This \*argument admits of an easy answer. [\*428] There is but one set of words introducing the gift over, both of the funded property and of the plate and books, and

(a) 3 T. R. 484.

(b) 7 East, 521.

(c) Willes, 348.

(d) Dougl. 264.

(e) 1 T. R. 593.

(g) 1 P. Wms. 600.

(h) 2 P. Wms. 421.

(i) 3 Atk. 282.

(k) 7 T. R. 555.

(l) 1 Eden, 64.

(m) 2 Ves. jun. 534.

(n) 1 Ves. 143; 3 Bro. C. C. 82.

(o) 7 Ves. 453.

(p) 5 Madd. 99; 1 Russ. 382.

(q) 4 Russ. 407.

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equally referable to both. How, then, is it possible to deny to the same words the same construction with reference to one and the same subject matter; for though the descriptions of property are two, they form the subject of but one gift? The distinction first introduced in *Forth v. Chapman*,<sup>(a)</sup> that the words "leaving issue" shall, in a will, have a different operation, according as they apply to real or personal estate, is the exception, not the rule; and, besides, it can have no application to a case where all the property disposed of is strictly of the same nature. The bequest of the funded property enables us to put a restricted construction on the expression "without issue as aforesaid" in the first part of the gift, and justifies, or rather requires, a similar construction in the latter part of it, the words referring to the two being identical, and the intention being obviously the same in both. In all these cases the inquiry is not what is the subject, but what is the intent; and the intent may be as effectually indicated by the gift of a single book as of a library. His Honor supposed that there was no intermediate bequest of the plate and books to the children; but this was a mistake, for the testatrix bequeaths them expressly to such of the children of Maria Taylor as she shall appoint. The children were to take them through the medium of their mother's appointment; and a gift of property to a person, as another shall appoint, contains by implication a gift to the object of the power; *Brown v. Higgs*.<sup>(b)</sup> Besides, the very circumstance that the issue were to take as the tenant for life should appoint, furnishes a ground, such [*\*429*] as was held sufficient in *Target v. \*Gaunt*,<sup>(c)</sup> and *Doe v.*

*Webber*,<sup>(d)</sup> for restricting the generality of the expression to such issue only as could have been objects of the appointment. It may be said that two of the subjects, the plantation and the funded property, are given in express terms; and that the omission of the plate and books indicates a different intention as to them; and the argument might be plausible, were it not manifest from the whole frame of the will, that the intention must

(a) 1 P. Wms. 663.

(c) 1 P. Wms. 432

(b) 4 Ves. 708. 5 Ves. 495.

(d) 1 B. &amp; Ald. 713.

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have been the same as to all the three species of property, and that it is merely from an accidental slip that the mention of the plate and books is not repeated with the others.

Assuming that the limitation over is valid both as to the funded property and the plate, the plaintiff must be held to have taken an absolute interest in both. His Honor thought that as children of Maria Taylor were not to take vested interests unless they attained twenty-one or married, the testatrix in the limitations to John Malcolm and his family contemplated a similar arrangement; and therefore, notwithstanding the remarkable diversity in its language, he read the latter limitation as if it referred to the same conditions. It is manifest, however, that the gift over, in case John Malcolm die under age and without issue, can never take effect. John Malcolm is now of age, so that one of the two events which together constituted the condition on which the property was limited over is no longer possible. Certainly the word "or" has in many instances been read "and" where the context seemed to require it, and in order to prevent an estate once vested from being defeated by a mere verbal inaccuracy; *Fairfield v. Morgan*.<sup>(a)</sup> But here, to support his Honor's construction, the word "and" must be read "or," and [\*430] that for the purpose of defeating an estate; a proceeding which is neither warranted by authority nor required by the sense: indeed it is in direct opposition to the decision in *Doe v. Cooke*,<sup>(b)</sup> where a bequest over, in case the prior legatee should die an infant unmarried and without issue, was held to depend upon one condition, attended with two qualifications, and to be incapable of taking effect, because, though the legatee died childless, he had attained twenty-one and married. That case, moreover, is a strong authority to show, that although where an express estate for life only is given to the first taker, with a contingent remainder over which fails, the absolute interest in the legacy will vest as undisposed of in the testator's personal representatives, yet if the subject matter of the gift has once been distinctly severed from the general mass of the property, and the

(a) 2 Bos. & Pul. N. R. 38.

(b) 7 East, 269.

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testator's intention appears to have been to dispose of the entire subject away from his executors, the whole will be held to have vested absolutely in the first taker. Even if his Honor's construction were admitted, however, the ulterior gift to Mary Ann Martha Malcolm would remain unaffected; it would then be limited to arise on either of two events; one of them, the death of John Malcolm under age, which is within the allowed period, but cannot now happen; the other which is too remote, being a general failure of his issue, and of course, causing the gift over which depends on it to be void. The limitation, therefore, is, in substance, to John Malcolm for life, with remainder to his eldest son forever, and if he die without issue, then over. Now these words would in a will of real estate undoubtedly vest an estate tail by implication in John Malcolm: *Robinson v. Robinson*,<sup>(a)</sup> *Hay v. Lord Coventry*,<sup>(b)</sup> Nor will the limitation [\*431] \*to his eldest son make the slightest difference in this respect; *Mellish v. Mellish*,<sup>(c)</sup> and it is a settled rule that wherever the words would create an estate tail in real estate, (whether expressly or by implication is wholly immaterial), they shall pass an absolute interest in personal estate; *Chandless v. Price*,<sup>(d)</sup> *Wilkinson v. South*,<sup>(e)</sup> *Brouncker v. Bagot*.<sup>(g)</sup>

The sum of 2,000*l.* directed to be paid out of money in the funds was clearly a specific legacy, which would have failed entirely had no funded property been found at the testatrix's death to answer it. It formed a charge upon that specific fund, which, subject to the burden, was bequeathed to a different legatee; and the rule both in real and personal property is the same, that wherever a charge imposed upon a particular estate by any accident fails of effect, it sinks into the estate charged with it, for the benefit of the person to whom that estate is given; *Wright v. Row*,<sup>(h)</sup> *Kennell v. Abbott*,<sup>(i)</sup> *Baker v. Hall*,<sup>(k)</sup> *Rose v. Rose*.<sup>(l)</sup>

(a) 1 Burr. 38.

(b) 3 T. R. 83.

(c) 2 B. &amp; Cress. 520.

(d) 3 Ves. 99.

(e) 7 T. R. 555.

(g) 1 Mer. 271.

(h) 1 Bro. C. C. 61.

(i) 4 Ves. 802.

(k) 12 Ves. 497.

(l) 17 Ves. 347.

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Mr. *Pepys*, Mr. *Spence*, Mr. *Preston*, Mr. *J. B. Parry*, and Mr. *W. Russell*, for the different defendants.

If Maria Taylor took, as we contend, an absolute interest in the funded property in the first instance, the gift over to John Malcolm and his family, being limited after an absolute interest, cannot take effect. Upon this point, the whole of the argument on the other side, as well as the authorities adduced to prove that John Malcolm, under the limitation in his favor, took the \*money in the funds absolutely, may be retorted with at [\*432] least equal force, and used in behalf of the defendants claiming as the representatives of Maria Taylor. There is no substantial difference between the two sets of limitations. The gift to John Malcolm is of a life estate expressly, and the gift over is not in case of his death without issue, but in case of his death under age and without issue. If, therefore, he would by virtue of the limitation over have taken a *quasi* estate tail in the funded property, *a fortiori*, Maria Taylor must have taken a similar estate under the prior limitation, and the plaintiff's interest would, of course, be defeated altogether.

The cases of *Robinson v. Robinson*,<sup>(a)</sup> *Chandless v. Price*,<sup>(b)</sup> and *Brouncker v. Bagot*,<sup>(c)</sup> already cited, establish two propositions; first, that wherever the words are such that if the subject of the gift were real property an estate tail would be created, they shall carry an absolute interest in personalty; secondly, that for the purpose of letting in and effectuating an apparent general intent, the particular intention is to be disregarded.

Now, upon the first proposition, it is impossible to deny that the gift over to John Malcolm amounts in substance to a limitation after a dying without issue generally of Maria Taylor. That was the construction which his Honor put upon the clause with reference to the plate and books: but he drew, it was said, a distinction between the plate and books, and the money in the funds,

(a) 1 Burr. 38.

(b) 3 Ves. 99.

(c) 1 Mer. 271.



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on the ground that the latter was, by the prior limitation, expressly vested in the children; and it was urged that [\*488] this distinction was unfounded \*because *Brown v.*

*Higgs*, (a) had determined that a gift to children as their mother should appoint, of itself created an interest in the children; and, farther, that the intent as to the two descriptions of property must have been the same. *Brown v. Higgs*, however, only shows that the limits separating trust (implying property) from power, are in some cases hardly to be distinguished. Here there is no gift at all of the plate and books to children, except by virtue of the power; and the gift over is in default of appointment, a circumstance from which it must be inferred, that the testatrix did not intend the children to take, unless by the express provision of their mother. His Honor, therefore, was right in his opinion that the limitation over was upon a general failure of issue, and consequently void; and that being so, the argument that the intention must have been the same as to both descriptions of property, applies powerfully in our favor.

It is admitted that here is a gift to Maria Taylor for life, with a remainder over on her dying without issue; and that if those words were to receive their ordinary legal construction, they would create in Maria Taylor a tenancy in tail of real estate. Now, unless a will affords clear indications that the testator has used technical expressions in another than their technical meaning, that meaning must prevail; nor will the court be induced by slight circumstances or verbal refinements to depart from its general rule: *Lepine v. Ferard*, (b) *Campbell v. Harding*. (c) It is said, that enough appears upon the face of the will to show that the testatrix did not use the words "death without issue," in their technical sense. Besides, the technical, which may be [\*434] said \*to be its ordinary legal sense, the expression is, in law, capable of only two other significations; it may mean a failure of issue living at the death of the previous taker, or it may mean a dying without having had issue. Neither of

(a) 4 Ves. 708; 5 Ves. 495.

(c) P. 390. *supra*.

(b) P. 378, *supra*.

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these significations, however, is the one which the plaintiff now seeks to attach to it; and both, indeed, are excluded as well by the language which the testatrix has used, and which gives a vested interest to children only in particular events, as by the inference arising from the fact, that either would involve the absurdity of supposing that she intended to make the limitation over depend upon a circumstance which might be utterly immaterial, the coming into existence of individuals who themselves would take no estate. The failure of issue here referred to must, therefore, according to its ordinary and legal import, be a general failure; and this construction, while it gives literal effect to every word contained in the instrument, has this further advantage, that it could in no possible event defeat the probable wishes of the testatrix. Even if a son of Maria Taylor had come into *esse*, and had died under age, leaving issue, such issue would still have taken benefits through the medium of their parents' mother; and it was plainly the object of the testatrix to provide for all the issue of that lady before John Malcolm or his family should be let in. The mode in which the plaintiff would construe the death of Maria Taylor without issue, is equally novel and extraordinary. He proposes to read the clause as if it had stood "without such issue," or, *reddendo singula singulis*, "without the several classes of issue who were to take under the prior limitations." There is no authority for this extraordinary construction, or rather interpolation; and the cases cited in support of it will be found, when examined, to have not the least bearing upon \*the point. In *Doe v. Perryn*,(a) the words were, "with- [\*485] out such issue," and there could be no doubt, not only from the use of the word *such*, but from the context, that the expression was there equivalent to "children." The same observation applies to *Rex v. Marquis of Stafford*.(b) In *Doe v. Lyde*,(c) *Wilkinson v. South*,(d) and *Salkeld v. Vernon*,(e) the court considered itself justified by circumstances and expressions appearing on the face of the will itself, in restricting the failure of issue spoken of,

(a) 3 T. R. 484.

(d) 7 T. R. 555.

(b) 7 East, 521.

(e) 1 Eden, 64.

(c) 1 T. R. 593.

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to failure of children living at the death of the first taker; in other words, such issue as would take in that event: but those cases afford no assistance to the plaintiff's argument; for, according to them, if a child of Maria Taylor had attained twenty-one, and afterwards died in her lifetime, he must have been excluded as not answering the description of issue living at her death. *Jesson v. Wright*, (a) in the House of Lords, a case where the attempt was unsuccessfully made to cut down the technical meaning of the word issue, exhibits very strikingly the reluctance with which the court is induced to deviate from the general rule.

Reliance is also placed on the words "as aforesaid," which are said to be descriptive of the class of issue who were designated as the objects of bounty in the preceding limitations of the money in the funds. That is, however, a strained and unnatural construction; and it refers the death "without issue as aforesaid" not to the last antecedent, which is a death without lawful issue generally, mentioned in the previous member of the clause in connection with the devise of the West India estate—the only death without issue which is \*anywhere [\*436] specified in terms—but to the failure of such issue as would, under the different contingencies expressed, take a vested interest in the funds. Read in this way, the words "as aforesaid" impose a very singular qualification on the event upon which the limitation over is to take effect; being considered as a compendious expression, which, when expanded, is equivalent to "such issue as, if sons, shall attain twenty-one, or if daughters, shall attain twenty-one or marry." Such a mode of interpretation does extreme violence to the language of the instrument, and has not even the merit of accomplishing what was plainly the leading purpose of the will—the providing for the issue of Maria Taylor at all events. The meaning of the testatrix unquestionably was, that nothing should go to John Malcolm and his family until the issue of Maria Taylor had failed; and yet if that lady had died leaving a son, who afterwards died under age

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leaving issue, that issue would, upon the plaintiff's construction, be of necessity excluded, although the words, no less than the intent, are clearly otherwise.

It is not, however, necessary to contend that Maria Taylor took a *quasi* estate tail in the funded property; although according to *Love v. Windham*,<sup>(a)</sup> *Lepine v. Ferard*,<sup>(b)</sup> and the general current of authorities already cited, it certainly would seem that the effect of the remainder limited upon her death without issue, was to enlarge by implication the life estate previously bequeathed to her in express terms. It is enough to show that the ulterior limitation to John Malcolm is void for remoteness. His Honor has determined it to be so, as far as the plate, books and pictures are concerned, on the ground that they were limited to him after a general \*failure [\*437] of issue; and except upon the distinction founded upon *Brown v. Higgs*, which has already been shown to be inapplicable, it is impossible to suggest a reason why the same principles should not equally extend to the bequest of the money in the funds: *Andree v. Ward*.<sup>(c)</sup>

Assuming, for the sake of argument, that the limitation to John Malcolm is valid, it is clear that he acquired no more than a life interest under it. The question must here be upon the effect of the subsequent bequest to his eldest son forever; for the ulterior gift to the sister not being limited on an indefinite failure of issue, but on an event which has failed, viz., the death of John Malcolm under twenty-one, the condition upon which alone her estate was to depend can never now arise. Where then is the authority for holding that the words "eldest son forever" can be construed to mean all the issue male? Even in real estate such a construction has never been supported, unless where it was a necessary inference from the context, that the testator contemplated the further object of disposing of his property

(a) 1 Lev. 290.

(b) P. 378, *supra*; and see *Parr v. Swindles*, 4 Russ. 283.

(c) 1 Russ. 260.

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to the whole line of issue in succession. In cases of that nature the court, following *Sonday's Case*(a) and *Byfield's Case*,(b) has sometimes decided that the word "son" may be considered as *nomen collectivum*, synonymous with issue male, a word of limitation creating an estate tail; *Robinson v. Robinson*.(c) That case, however, went a great way, and the judges have been disposed to narrow, rather than to extend the principle, and to rely on the effect of a subsequent limitation in default of

[\*438] "such issue;" *King v. Burchell*,(d) *Frank v. \*Stovin*,(e) *Stanley v. Lennard*,(g) *Doe v. Webber*,(h) *Doe v. Halley*,(i) the last of which is an express decision, that under a devise to A. for life, with remainder to his eldest son (then unborn) and the heirs of such son, A. took no more than a life interest.

The 2,000*l.*, legacy, having lapsed by the death of Mary Ann Martha Malcolm under age and unmarried, must sink into the general residue. That sum was completely severed from the general mass of the funded property, and the legatees of that property do not take it subject to a charge in Mary Ann Malcolm's favor, but before it comes to them at all, it must first answer the legacies previously given, of which the sum in question was one. The money in the funds and the 2,000*l.* are equally specific bequests; *Sleech v. Thorington*.(k) A different construction would give to the legatees of the funded property a larger share of that property than the testatrix ever intended they should have. This is no more, therefore, than the case of a particular and a general residue, the latter of which, according to the settled rule, includes and carries everything which in the result is not effectually disposed of. *Page v. Leapingwell*,(l) *Green v. Scott*,(m) *Tregonwell v. Sydenham*,(n)

(a) 9 Rep. 127.

(b) Cit. 1 Vent. 231.

(c) 1 Burr. 38.

(d) Amb. 379; 1 Eden. 424.

(e) 3 East, 548.

(g) 1 Ed. 87.

(h) 1 B. &amp; Ald. 713.

(i) 8 T. R. 5.

(k) 2 Ves. sen. 560.

(l) 18 Ves. 463.

(m) 1 Ves. jun. 282.

(n) 3 Dow, 194; see also *Green v. Jackson*, p. 238, *supra*.

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1832: *March 10th*,—THE LORD CHANCELLOR:—Four questions are raised upon this will; first, whether the residue of the money in funds (said to amount to 70,000*l.*) is given to Maria Taylor \*absolutely, or only for her life; in other [\*439] words, whether or not the gift over of that residue to John Malcolm is good: secondly, whether the plate, books and portraits are given absolutely to Maria Taylor, or only for her life, and then over to John Malcolm: thirdly, whether John Malcolm, if he takes either or both stock and plate, takes them absolutely, or only for his life: and fourthly, whether the lapsed legacy of 2,000*l.* given to Mary Ann Martha Malcolm belongs to the residue of the stock, or to the general personal estate.

Of these questions the most important, in my view, is the first; but the others, and especially the third, are also of considerable moment, with reference both to the amount of the interests involved, and the nicety of the arguments applied to it, the point being one by no means free from difficulty.

With a view to the first three questions, but especially the first, it is necessary to examine the schemes and structure of the will, from the first mention of the residuary fund under consideration. [The LORD CHANCELLOR read from the will the clauses of gift to Maria Taylor and her children, and proceeded:] Here it is observable, that the plantation, funded property and plate, are all blended together during the earlier part of the provisions; they are all then included in the gift to the first takers, Elizabeth and Maria; all three in the gift to the survivors; all three in the gift to Maria Taylor's sole and separate use (the clause making her receipt a discharge being for produce, profits, interest, or dividends, words applying to all the descriptions of property); all three in the power of appointing to her children: and it is only when we come to the fifth provision that the plate is dropped, \*and in default of her appoint- [\*440] ment, the plantation and stock, without the plate, are dealt with. Both are given to Maria Taylor's children, share and share alike, their heirs and assigns; and if but one, the

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whole to that one, his heirs and assigns. Then comes a provision which does not extend to the plantation. This provision, confined as it is to the stock, is of much importance; for it postpones the vesting of an interest in it to the age of twenty-one in the case of sons, and twenty-one or marriage in the case of daughters; whereas the interest in the plantation is allowed to vest in the children, both sons and daughters, at their births. The words are quite clear and express. In these circumstances no question is made upon the devise of the plantation. His Honor held, that it was given to Maria Taylor for life, with a power of appointing to her children, and in default of appointment, to her children, share and share alike, in fee; and if she have no children, then to Mrs. Watson Taylor's children; and it is clear, that if Maria Taylor had children, their interest vested at their birth. That the legacy of the stock did not vest, but was contingent, is equally clear.

We come now to the gift over of the stock, and everything turns upon the reference made in that gift: "And in case Maria Taylor shall die without issue as aforesaid, I then give and bequeath, after the death of the said E. G. Taylor and Maria Taylor, the said residue of my money in the funds, and all my said plate, books and portraits, &c., unto the said John Malcolm, and his assigns, for his life; and after his decease, I give and bequeath the same to his eldest son forever."

Suppose the clause had stood "without issue" alone, and the words "as aforesaid" had not been added, it might have [\*441] been argued that this either meant a general \*failure of issue, or a failure of such issue as last mentioned, namely, the issue to take the plantation; the gift over of the plantation being the last antecedent. In that case, such an argument might have been more easily maintained than it can when the words are followed by the expression "as aforesaid;" yet even standing alone they could not, without difficulty, have this latter sense imposed upon them, namely, of reference to the last antecedent; for the children are to take the plantation at their

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birth, and they are only to take the stock (being the subject of the gift over now under consideration), at twenty-one, or at twenty-one or marriage.

The words "as aforesaid," however, plainly refer further back, and aid us in assigning its true construction to the gift over.

In the first place, the natural use of these words points not to the immediately preceding clause, but to one more remote; they do not mean "last aforesaid." To convey that sense the phrase would have been simply "without such issue," or "without issue as last aforesaid." The expression "without issue as aforesaid" points to some preceding provision. Next consider what the testatrix is dealing with in this gift over. It is the stock; the plate also, I admit—and that raises some doubt; but certainly not the plantation. Now the stock was not in any way the subject of the immediately preceding bequest, but it was the subject of the one before.

Had this gift over stood immediately after the clause providing for a default of appointment to the stock, and postponing the vesting of it, and had it so stood, without the addition of "as aforesaid," there could have been no doubt whatever, that the words "without issue" must have been held to mean such issue as is \*referred to in the preceding clause, [\*442] touching the appointment and vesting. This is plain from the case of *Target v. Gaunt*,<sup>(a)</sup> and in a great degree also from *Goodright v. Dunham*.<sup>(b)</sup> In the former, a term being given to A. for life, with remainder to such of his issue as he should appoint, and if he died without issue, remainder to B., Lord Macclesfield held that issue in the gift over meant such issue as A. might appoint to under the preceding limitation, and that the executory bequest to B. was good. In *Goodright v. Dunham*, where the devise was to A. for life, and after his death to

(a) 1 P. Wms. 432.

(b) Doug. 264.



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his children equally and their heirs, and in case he dies without issue, over, Lord Mansfield held "in case he dies without issue," to mean "in case he dies without children;" because, he said, the gift over was tacked to the preceding clause.

Then does the mere separation of the gift over from the provision respecting the stock, prevent this reference? Are not the identity of the subject matter, namely, the stock, and the words of reference, viz., "as aforesaid," sufficient, if, not singly, yet taken together, to establish the connection between the gift over and the preceding provisions? The cases, such as *Salkeld v. Vernon*,<sup>(a)</sup> *Doe v. Lyde*,<sup>(b)</sup> *Rex v. Marquis of Stafford*,<sup>(c)</sup> where issue has, in similar circumstances, been held to be a word of purchase, need not be referred to, or more than mentioned. In all of them the word issue was held to mean the children before referred to—to lose the character given it by Lord Hale in *King v. Melling*,<sup>(d)</sup> of being *nomen collectivum* of itself, and to assume that individuality which belongs to "children," a

[\*443] \*word that may be *nomen collectivum*, but only, as the same great authority has said, by being made so, and; as it were, against its natural sense.

It is no doubt true, that to the construction here given it may be objected, that the plate is found to be covered by the words of the gift over, as well as the stock; and that the previous clause, to which one construction makes the gift over bear reference, comprehends the plantation as well as the stock. Of the former objection it may suffice to dispose when we come to the second question, which relates to the plate; and to the latter it seems a satisfactory answer, that although the plantation is dealt with in the former clause, yet so is the stock, the subject of the gift over, and that the stock is dealt with in a way wholly different from the plantation.

Again, the will, those parts of it at least under consideration, all plainly look to children throughout, and provide for them.

(a) Eden, 64.

(c) 7 East, 521.

(b) 1 T. R. 593.

(d) 1 Vent. 531.

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The scheme of the disposition is, generally speaking, to give to Mrs. Watson Taylor's family the plantation, and to John Malcolm the money in the funds, after Maria Taylor and her children.

No doubt, the manner in which this intention is to be made effectual in John Malcolm's favor, brings him in before the grandchildren of the first taker (Maria Taylor) in the event of her children dying under age. But that does less violence to the general intent than giving to Maria Taylor an absolute interest in the money, and leaving out John Malcolm altogether. The objection, too, applies to the case of sons only, and not daughters; for the interest of daughters vests on their marriage; and the event of a son dying under age, and leaving children, is rarely contemplated in such \*arrangements. [\*444] This is shown by the fact, that the ordinary form of bequest, which is the one here used, does not provide for the vesting of an interest in sons upon their marriage. At all events, the violence apprehended is infinitely less when the possible exclusion is not that of the giver's own grandchildren, but merely of the grandchildren of a collateral, the first taker; and yet a construction exposed to this possibility is constantly adopted, even where the testator's own direct descendants may by possibility be the victims of it.

Upon the whole, therefore, I am of opinion that the gift over of the stock to John Malcolm is good, and that Maria Taylor did not take an absolute interest in it.

Secondly; Does the plate fall within the same rule and go over to John Malcolm, or did Maria Taylor take an absolute interest in it?

It is first given with the plantation and the stock to Elizabeth and Maria and the survivor for life, and after the survivor's decease, to Maria's children, as she may appoint. Here the plate is dropped, and no provision with regard to it is made in the event of Maria Taylor failing to exercise her power of appointment.

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So that in this first portion of the will there is no dealing with the plate to which, in construing the subsequent gift over, the words, "without issue as aforesaid," can be referred back. If, then, the construction as to the stock be a sound one, which refers those words to such issue as had been mentioned when dealing with the same fund in the former clause, and not to the issue mentioned when dealing with the plantation, by parity of reason, all reference back must be excluded in construing the same words as to the plate; inasmuch as there is nothing [\*445] before mentioned touching the plate, in \*connection with the children, or with anything to which issue can refer. The plate then will be given over on a general failure of issue; and whether from the gift being too remote, or from the gift to her being what, in the case of realty, would be an estate tail—it is indifferent which—Maria Taylor takes absolutely, and consequently the interest in this part of the property now vests in her personal representatives.

Thirdly; Does John Malcolm take an absolute interest, or only for his life, in the part which goes over to him, that is, in the stock? That "son" may be a word of limitation is not denied; but there must be some plain reason for making it so. None of the cases from *Byfield's Case*, downwards, certainly not *Robinson v. Robinson*, come at all near the violence which it would be doing to the obvious meaning of this clause to construe "eldest son" as *nomen collectivum*. As to the superadded words "forever," they clearly are only used to contra-distinguish the interest which the eldest son of John Malcolm was to take, from that which John Malcolm himself was to take; the one for life, the other absolutely.

But the gift over is said to raise a different construction: "In case the said John Malcolm shall die under age and without issue, I then give and bequeath the said residue of my said money in the funds, &c., unto the said Mary Ann Martha Malcolm."

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Supposing then that reading the gift over in the conjunctive ("and" instead of "or") would have the effect of giving an estate tail to John Malcolm, if the property were real estate—a point which is disputed; and that, the property being personal, it would give the absolute interest to John Malcolm, we have here only a choice of \*difficulties, as is but too [\*446] frequent in such cases. If the clause is read conjunctively, then, by the supposition, John Malcolm would take an absolute interest to the exclusion of his son, to whom an absolute interest had just before been limited upon the determination of the life interest which was alone given expressly to John Malcolm. If, on the other hand, it is read in the disjunctive, though the son's interest may be defeated by the father dying under age, and yet leaving issue, viz., that son, in which case it would go over; yet that is only a possibility, whereas the other is a certainty; and it is, moreover, a possibility not contemplated in the ordinary case of such limitations, as I observed upon the first point, and not contemplated by this testatrix in the former part of the will, where she is disposing of this very same fund, or, at least, of what constitutes the bulk of it, the stock. It is fit that, in making our election between these difficulties, we keep in view the plain intention expressed of giving to John Malcolm a life interest, and to the eldest son, as a purchaser, an absolute interest expectant upon the determination of the former; and though we are not at liberty to reject the words which follow, for any apparent inconsistency with this intention, yet if there are two ways of reading them, one of which only frustrates the intention by a remote possibility, we should choose that rather than one calculated to operate a certainty of exclusion, more especially when such a possibility appears not to have been in the contemplation of the maker of the instrument.

It must, however, be admitted that the reading of "or" instead of "and" is rarely to be found sanctioned by decision. *Maberly v. Strode*(a) and one or two other cases of the same kind

(a) 3 Ves. 450.

[\*447] may be reckoned for nothing, \*because the words would have been hardly sensible if read in any other way. That was a limitation to A. for life, and after his death to his children, but in case he died unmarried *and* without issue, over: if he died unmarried, he must in contemplation of law, have died without issue. But in *Brownsword v. Edwards*,<sup>(a)</sup> Lord Hardwicke read "and" as "or," to effectuate the intention appearing on the will. The devise there was to trustees to receive the rents till A. should attain twenty-one or have issue, and then to A. and the heirs of his body, but if he died before twenty-one *and* without issue, then in trust for B., his sister. A. died after twenty-one and without issue; and Lord Hardwicke supported the gift over to the sister by reading *and* as *or*. It has been said, and perhaps truly, that Lord Hardwicke would have felt much more repugnance to giving the words this construction, had any other event happened. And the Court of King's Bench has certainly gone against, though they cannot be said to have overruled his decision in *Doe v. Jessop*.<sup>(b)</sup>

The reason given by Lord Ellenborough for questioning the case of *Brownsword v. Edwards*, that in a will words are to be taken in their natural sense, is one which all must heartily wish could always be applied and taken as a general canon. But unfortunately it is too late; rules of technical construction are no longer to be rejected even in the case of wills; and the utmost that can now be done is to follow the natural sense of the words used in such instruments, wherever those rules will permit us. It may be, I trust it certainly is, going much too far to say, with one of the learned counsel, that no conveyancer can give a safe opinion upon any one case on the law of real property which comes before him in the twenty-four hours. Nevertheless [\*448] it cannot \*be denied that much uncertainty has been introduced into this branch of the law. This is not, however, to be imputed solely to the adoption of technical rules. It has been in part owing to not keeping by the technical rules

(a) 2 Ves. sen. 243.

(b) 12 East, 288.

once introduced. The struggles in favor of intention, sometimes made on the ground of natural meaning, sometimes on the ground of other rules as technical as those striven against, have been a fruitful source of this uncertainty, and in more instances than one, a recurrence to the original technical principle has been seen to sweep away a multitude of intermediate decisions, while the new decisions are found to leave unsettled almost as much as they have fixed.

Against the construction now given to this part of the will it is needless to say that objections may be raised from cases which may be put, in which a result would take place most unlike any the testatrix could have thought of. But that is not peculiar to this case; it may be said to happen, and almost of necessity, in every instance where a gift over is frustrated by being limited on a general failure of issue. Upon the whole I do not differ with his Honor in his construction of the gift to John Malcolm, holding that he takes a life interest only in the testatrix's money in the funds.

Fourthly; there remains only the question as to Mary Ann Martha Malcolm's lapsed legacy of 2,000*l.*; and I cannot read the will and doubt that it belongs to the particular residue. That residue is given thus, "all the residue and remainder of my money in the funds after payment of the annuities and legacies herein-before bequeathed," of which the legacy that has lapsed is one.

The result is that, upon all the four points, the judgment of the Master of the Rolls must be affirmed.

[\*449]

\*IN RE ROBINS.

1831: 4th and 8th March.

In a case where a lunatic had two estates situate at a distance from each other, and of considerable value, the court under the circumstances appointed a separate committee for each.

THIS was an application for the appointment of two committees of the lunatic's estate, not jointly in the usual way, but that one committee might be appointed of the Warwickshire, and another of the London property. The estates were of great value; that in Warwickshire consisting partly of coal mines which required considerable superintendence; and the other chiefly of houses and other leasehold property in London and Middlesex, with a rental amounting to more than 3,000*l.* a year.

Mr. *Tinney*, in support of the application, observed that nothing was more common in practice than for two committees, who were appointed jointly, to divide the management, and each take a portion of the property under his peculiar charge. From family circumstances, however, that could not conveniently be done here. But it was of the utmost importance that there should be persons resident on the spot to manage the respective properties, which were of a nature to call for all the vigilance and activity of separate committees. The proposed arrangement, besides, was one which, while it would be conducive to the interest of the lunatic's estate, would be more satisfactory than any other to all the parties having expectant interests.

The heir at law and next of kin made no objection.

THE LORD CHANCELLOR at first said that he had great doubts, as the case seemed to be without precedent. But he afterwards stated that he had been furnished with an authority by [\*450] Master Dowdeswell, which \*was on all fours with the present case: he therefore directed the order accordingly, as it would be much more convenient for the estate and for all parties.

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 Smith v. Nethersole.
 

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## SMITH v. NETHERSOLE.

1832: 9th, 10th and 29th February.

A writ of *ne exeat regno* will not be granted to a plaintiff residing in a foreign country.

THE Solicitor-General (*Sir William Horne*), and Mr. *Burge*, for the defendant, moved that a writ of *ne exeat regno*, which had been granted in this case, might be dissolved. The bill was filed in September, 1831, for an account of the partnership dealings and transactions between the plaintiff and defendant, as vendue masters in the island of Jamaica. One of the grounds taken in support of the motion was, that though the plaintiff, when he filed the bill, was in this country, having made the necessary affidavit at Sittingbourne, in Kent, yet that his coming to England was only for that special purpose, and that his usual place of residence was in France. *Hyde v. Whitfield*(a) was referred to.

Sir *E. Sugden* and Mr. *O. Anderdon*, *contra*, cited *Grant v. Grant*(b)

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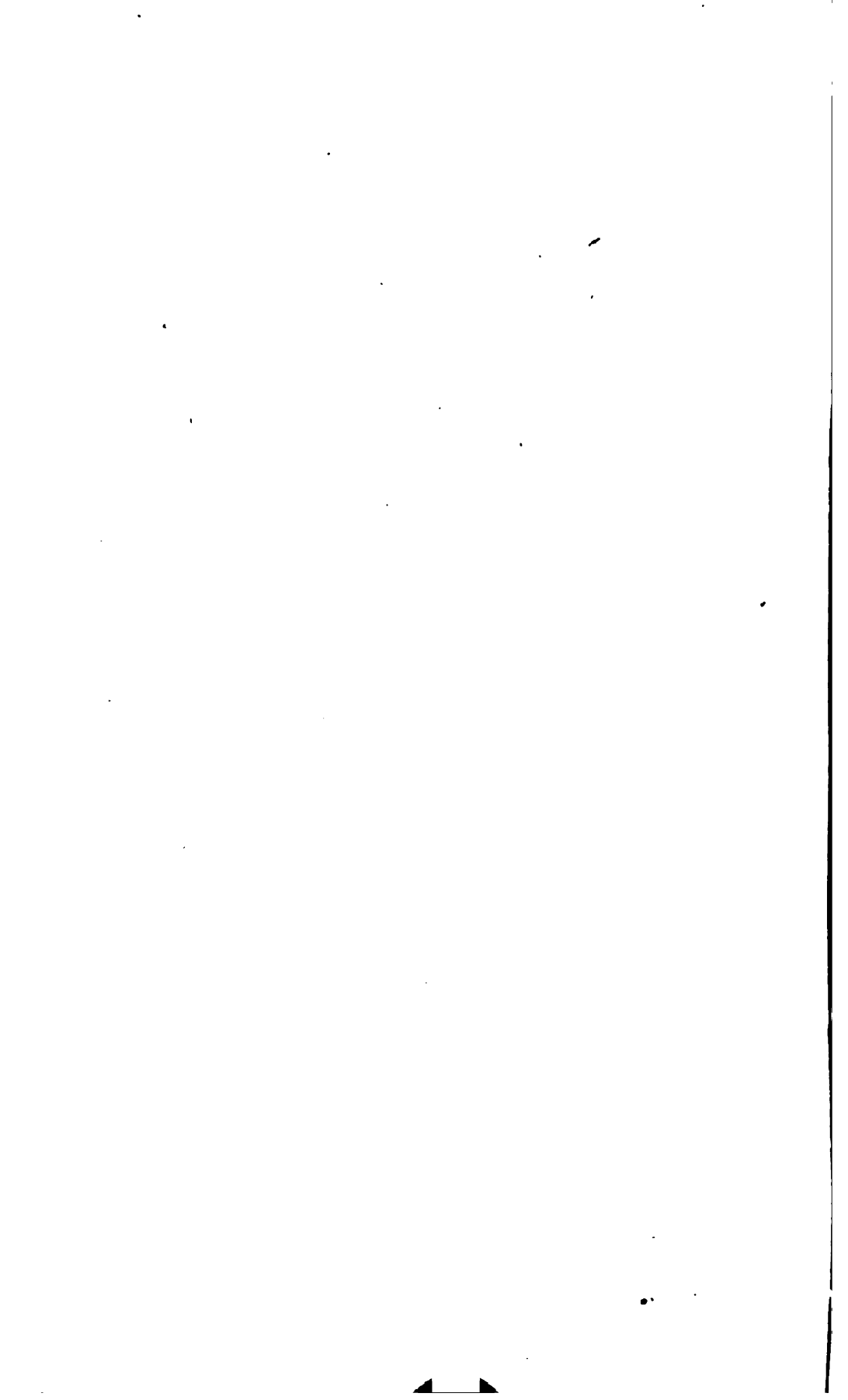
*Feb. 29th.*—THE LORD CHANCELLOR, on the ground that the plaintiff resided abroad, and that his visit to this country was colorable and temporary only, discharged the writ.(c)

(a) 19 Ves. 342.

(b) 3 Russ. 598.

(c) In *Douglas v. Terry*, 4th November, 1835, where the plaintiff resided in Scotland, the Vice-Chancellor upon that single ground discharged the *ne exeat*, following the authority of *Smith v. Nethersole*; and in a previous case of *Walker v. Christian*, 3d March, 1835, also before the Vice-Chancellor, the same, among other objections, was successfully taken. *Ex relations* Mr. *Wakefield*.





REPORTS OF CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY.

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\*GARRARD v. LORD LAUDERDALE. [\*451]

1831: 27th and 29th January, 11th February.

A person by deed conveyed to trustees certain personal property, upon trust to sell the same, and, after satisfying certain specified charges and claims in a prescribed order out of the proceeds, to divide the residue among his scheduled creditors, none of whom were parties or privy to the execution of the deed. The trustees, after partially executing the trusts by making sales and paying off the specified charges and claims in the order directed, concurred with the grantor in doing several acts inconsistent with the subsequent trusts: Held, that after the death of the grantor a scheduled creditor had no equity against the trustees to enforce the execution of the trusts, the conveyance being in the nature of a private arrangement for the personal convenience of the grantor, and vesting no right in the creditors.

THE facts of this case, as they appeared upon the bill and answer, are fully stated in Mr. Simon's Report on the hearing of the motion before the Vice-Chancellor.(a)

HIS Honor having refused the plaintiff's application, it was now renewed before the Lord Chancellor.

Mr. *Knight* and Mr. *Rogers*, for the motion.

\*Sir *Edward Sugden*, Mr. *Pepys*, Mr. *Lynch*, and Mr. [\*452]  
*Wigram*, *contra*.

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Garrard v. Lord Lauderdale.

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The same general line of argument was followed by the counsel on both sides, as had been taken in the court below. The following additional cases were also cited and commented upon: *Stephenson v. Hayward*,<sup>(a)</sup> *Sloane v. Cadogan*,<sup>(b)</sup> *Ex parte Pye*,<sup>(c)</sup> *Pulvertoft v. Pulvertoft*,<sup>(d)</sup> *Ex parte Haywood*,<sup>(e)</sup> *Scott v. Porcher*.<sup>(g)</sup>

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*February 11th.*—THE LORD CHANCELLOR:—This case was argued before me at considerable length; and it was one which seemed likely to be of general importance from the frequency of such trust deeds for the payment of debts, and as it was strongly urged that the decision of the Vice-Chancellor was at variance with the current of authorities, I took time to consider my judgment, and I also procured a copy of the papers in the case of *Wallwyn v. Coutts*,<sup>(h)</sup> on which case his Honor was said to have relied; but I see no reason for departing from the decision which was pronounced in the court below.

[His Lordship then stated the effect of the trust deed, and proceeded:] This deed, though for a very meritorious purpose, must be considered as to all intents a voluntary conveyance, even assuming it to be in the strictest sense of the term a trust deed.

Now it has been held, ever since the case of *Leech* v. [\*453] *Leech*,<sup>(i)</sup> in the time of Lord Nottingham, that a voluntary conveyance, though void as against a purchaser, is, nevertheless, good as against the representatives of the person who executes it; and I cannot, therefore, but doubt the accuracy of that part of the report of *Wallwyn v. Coutts*, where Lord Eldon is represented to have said, he refused the motion on the ground of the trust being voluntary, and, consequently, a

(a) Prec. Ch. 310.

(b) Sagd. V. & P. App. No. 26.

(c) 18 Ves. 140.

(d) Ibid. 84.

(e) 2 Rose, 355.

(g) 3 Mer. 652.

(h) 3 Mer. 707, and more fully in 3 Sim. 14.

(i) 1 Ch. Ca. 249.

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Gerrard v. Lord Landendale.

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trust which could not be enforced against the Duke of Marlborough and his son the Marquis. Lord Eldon, who, in deciding *Ellison v. Ellison*,<sup>(a)</sup> had stated the principle so distinctly, and who, again and more recently, had deliberately recognized it in *Pulvertoft v. Pulvertoft*,<sup>(b)</sup> could hardly, I think, have so expressed himself. In the first of those cases his Lordship laid down what has ever since been the rule, taking the distinction between a trust *executed*, where a right vested, and a trust which rests *in fieri*, not executed; and he said (in conformity with his own subsequent decision in *Pulvertoft v. Pulvertoft*), that when the deed was so executed, he would allow the *cestui que trusts* to appear in court, and would take notice of their existence, and enforce their rights both against the trustees and against the maker of the instrument; but that it was otherwise where the relation had never been fully established, the matter only resting in covenant; and that in such a case he would not interfere.

The ground of this distinction between cases where the matter rests *in fieri*, and those where the instrument is executed and the relationship of trustee and *cestui que trust* created, is somewhat obscure; and perhaps a simpler course in the first instance would have been not to give effect to any voluntary conveyance (\*whether executed or not), either against purchasers as [\*454] to whom it would, of course, be void by statute, or against the grantor himself. But I am here to deal with the principles as I find them settled by the uniform tenor of decisions; and the rule, as laid down in *Colman v. Sarrel*,<sup>(c)</sup> and afterwards adopted in *Ellison v. Ellison* and *Pulvertoft v. Pulvertoft*, is not now to be controverted, that the relationship will not be established against the author of a voluntary conveyance, but that wherever the court finds it already constituted, the relationship will be followed out and enforced.

Is, then, *Wallwyn v. Coutts* inconsistent with those cases? For it was strongly pressed upon me that that case could only be supported by overruling all the former authorities; and it

(a) 6 Ves. 656.

(b) 18 Ves. 84.

(c) 1 Ves. jun. 50.

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 Garrard v. Lord Lauderdale.
 

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was further argued, that *Wallwyn v. Coutts* would be found to differ from them in this respect, that there the second deed was for consideration. If that had been the fact, the case, as I observed at the time, would have been utterly valueless—not worth the paper on which it was printed; for it would only have affirmed a proposition which never was disputed, namely, that, as against a purchaser, a voluntary conveyance could not be enforced. It is satisfactory to find that there is not a shadow of foundation for that suggestion. There were there three deeds, and Wallwyn claimed under the first; but neither was any creditor a party to it, nor was there any consideration moving from a creditor. That case is on all fours with the present, with perhaps this single exception, that there are expressions favoring very much the idea that the deed was not to be considered as vesting an authority in the trustees; for the creditors were to be paid on the request of the Marquis of Blandford, who [\*455] \*rather stood in the shoes of the creditors than of the author of the deed. I recur, then, to the question, Is *Wallwyn v. Coutts* inconsistent with the former cases? The same judge decided that case who had decided *Ellison v. Ellison*, and *Pulvertoft v. Pulvertoft*; and Lord Eldon was not likely rashly to make a decree inconsistent with another which he had pronounced but a short time before. Upon the principle laid down in *Ellison v. Ellison*, it is clear that no particular form of words is necessary to constitute a trust; but I take the real nature of this deed to be, like that in *Wallwyn v. Coutts*, not so much a conveyance vesting a trust in A. for the benefit of the creditors of the grantor; but rather that it may be likened to an arrangement made by a debtor for his own personal convenience and accommodation—for the payment of his own debts in an order prescribed by himself—over which he retains power and control, and with respect to which the creditors can have no right to complain, inasmuch as they are not injured by it, they waive no right of action, and are not executing parties to it.

*Hill v. Secretan*,<sup>(a)</sup> *Williams v. Everett*,<sup>(b)</sup> and *Scott v. Por-*

(a) 1 Bos. & Pull. 315.

(b) 14 East, 582.

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*cher(a)* depend rather upon the principles which are applicable to this species of arrangement. The first of those cases, indeed, in which it was ruled that if A. consigns goods to B., to be held for the benefit of C., the latter has such an interest therein that he may effect an insurance upon the goods, has always been considered as going to the very verge of the law. But in the later and much greater authority of *Williams v. Everett*, it was decided, that where there was no privity between the parties, the proceeds of bills received by A., to whom they were remitted by C., is money had \*and received not to the [\*456] use of B., the creditor for whom the bills were to be held, but to the use of C., the party remitting them; the court there holding, consistently, that this is in the nature of a voluntary arrangement by the person who owes the money. *Scott v. Porcher* was precisely the same case, occurring in a court of equity; for that is the case of a mere mandate, revocable by the party who consigned the goods.

Now two things, if not more, were done in the lifetime, and by the authority of the Duke of York, which were inconsistent with the continuance of the arrangement in the present case. His Royal Highness himself paid off several of the scheduled creditors, and to a large amount in the whole, out of moneys of his own; and further, the trustees, by his direction and at his request; paid back to him a considerable portion of the fund which the trust deed had placed in their hands; circumstances tending strongly to show the intent and understanding of the parties themselves with respect to the nature and effect of the transaction. It is unnecessary, therefore, to inquire what might have been the case if the party executing the instrument had never thought fit to do any act inconsistent with its provisions; but the question might then be liable to a very different consideration. The motion to discharge the Vice-Chancellor's order must be refused.(b)

(a) 3 Mer. 652.

(b) This case has been referred to and considered in several subsequent cases, particularly in *Acton v. Woodgate*, 2 Mylne & Keen, 492, *Bill v. Cureton*, *ibid.* 503; and see also *Petre v. Espinasse*, *ibid.* 496.

[\*457]

\*FITZGERALD v. STEWART.

1831: 1st March.

Where consignments have been made from abroad to answer an annuity which the owner of the property consigned is liable to pay, and the consignee in this country gives notice of the arrangement to the annuitant, and makes payments in pursuance of it, the consignee is not afterwards at liberty to discontinue such payments, so long as he has any proceeds of the consignments in his hands.

The circumstances of such a transaction constitute an implied trust, which the court will enforce against the consignee, for the benefit of the annuitant.

THE circumstances of this case, as they appeared upon the bill, are fully stated by Mr. Simons in his report upon the argument of the demurrer in the court below.(a)

The Vice-Chancellor having overruled the demurrer, the defendants, Stewart and Westmorland, appealed from his Honor's decision.

Sir *E. Sugden* and Mr. *Burge*, in support of the appeal, submitted that, assuming the facts set forth in the bill to be true, no case of lien was made out by the plaintiff as against Messrs. Stewart and Westmorland; and they referred to the cases of *Garrard v. Lord Lauderdale*,(b) *Worrall v. Harford*,(c) *Ex parte South*,(d) *Scott v. Porcher*,(e) and *Williams v. Everett*.(g) They further contended, that the subject of the suit was properly cognizable in the Court of Chancery in Jamaica; and that this court, therefore, ought not to interfere.

Mr. *Pepys* and Mr. *Roupell*, who appeared in support of the bill, were not called upon to argue the case.

THE LORD CHANCELLOR:—Though I shall in this case affirm the judgment of the Vice-Chancellor, I shall certainly not do

(a) 2 Sim. 333.

(b) 3 Sim. 1 and p. 451, *supra*.

(c) 8 Ves. 4.

(d) 3 Swan. 392.

(e) 3 Mer. 652.

(g) 14 East, 582.

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so on the grounds stated in the report of his Honor's judgment. \*His Honor, according to that report, after [\*458] observing that he does not mean to unsettle the law as laid down in the case of *Williams v. Everett*,<sup>(a)</sup> states two circumstances as the foundation of his decision in the present case—the one that the receipt of the money had been notified to the plaintiff, and the other that the bill alleged that an express trust had been created.

These are reasons to which I cannot accede. The first existed in the case of *Williams v. Everett* even more remarkably than here; yet the decision there was in favor of the consignee. That was a case of bills remitted by a debtor to his agent or consignee, with a letter ordering him to pay the debts due from the party making the remittance, and among the rest, that to Williams, and that the balance should be held for his use; but the debtor directed that the title of each creditor to receive such payment should be the production by the creditor, of a letter of advice from the debtor notifying the arrangement. Williams accordingly produced such a letter, and made the demand, as is stated by Lord Ellenborough in his judgment. It is not, therefore, a correct representation, and it tends to confound our ideas of law, to say that *Williams v. Everett* differed from the present case in the circumstance of the notification. The judgment there proceeded entirely on the want of all privity, and on the fact that there was no adoption by the consignee. And the language of Lord Ellenborough, when he speaks of the defendants agreeing to hold the profits, when paid, until, by some engagement entered into, have precluded themselves from receding from their contract, points to a circumstance which raises a material distinction between *Williams v. Everett* and the present case, and one directly applicable to the latter.

\*If I were to allow this demurrer, I should be carrying [\*459] the rule laid down in *Williams v. Everett* a great

(a) 14 East, 582.



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deal further ; for that was a case where, so far from an assent, there was a refusal to recognize the arrangement. It cannot be denied that, in the case under appeal, the annuitant would have a right to complain, if on a sudden, the consignees were to stop the payment of her annuity. For it is not pretended that she would be entitled to have the annuity paid out of the consignments, whether there were or were not sufficient funds to answer the amount of her demand. The bill only goes to this extent—that the consignee, by his acts, has subjected himself to hold the consignments subject to the annuity, so far forth as the funds may be sufficient for the purpose ; whereas, in *Williams v. Everett*, the creditors who received the letter gave up nothing, and had no compliances made to them ; on the contrary, they met with a flat refusal.

In order to make that case similar to the present, the creditor should have received a part of the debt, and an assent *rebus ipsis et factis* to the payment of the rest. Could Everett then have turned round after paying half of what was due under the order, after lulling the creditors into security—could he then have refused to fulfil his contract ? That is the case here. These defendants pay the annuity for one year ; and I must, in passing, observe that I cannot accede to the doctrine that an annuity is to be taken by piecemeal, as so many separate transactions : on the contrary, it is all one transaction. The defendants have duly paid it for a certain time ; and after leading the plaintiff to expect that they would continue so to pay it, they turn round and repudiate their own act. Now, on the authority of those cases, that cannot be permitted ; and I should be carrying the [\*460] principle a great step further if I were to \*extend it to cases where the consignee had assented to the arrangement of the debtor.

As to this being an express trust, by which I understand a trust created, not by facts and circumstances, but by express words, there is no such trust here ; the court is left to raise it by implication of law from the dealing and conduct of the parties.

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The nature of the agreement is much more correctly stated in the argument of the counsel in the court below, than in the language ascribed by the report to the learned judge. There is no express trust, nor anything like it; all that the plaintiff contended for below was, that there were facts and dealings in the case which sufficiently indicated the assent of the consignees, and from which, by implication, the relation of trustee and *cestui que trust* might be fairly considered to be constituted.

Upon these grounds, and not upon any of those attributed to his Honor, I have no difficulty whatever in affirming this judgment.

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\*ATTORNEY-GENERAL v. THE ARCHBISHOP OF [\*461]  
YORK.

1831: 5th March.

Reference to settle a scheme for the application of the revenues of an ancient hospital, of which the original foundation and endowment were unknown, but of which the master, after paying a certain fixed yearly stipend to a chaplain, and also to six alms-women who had apartments in the hospital, and defraying the repairs, applied the surplus income to his own use.

THIS was an information filed by the Attorney-General, without a relator, and proceeding upon the certificate of the charity commissioners under the provisions of the 59 G. 3, c. 81. The defendants were, the Archbishop of York, the Dean of Rippon, and the corporation of the master, brethren and sisters of the Hospital of St. Mary Magdalen, at Rippon.

The information stated, that, in the early part of the twelfth century, Thurstan, then Archbishop of York, founded an hospital, called the Hospital of St. Mary Magdalen, at Rippon; for the relief and support of sick indigent persons, and that the hospital became seised of very considerable real estates; that the original

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institution consisted of a master and chaplain, brethren and sisters, who many years ago were incorporated under the name of the master, brethren and sisters of the Hospital of St. Mary Magdalen at Rippon; that the particulars of the foundation, or the time of the incorporation, could not now be discovered; that within the last two centuries the establishment had at different times considerably varied, but that for many years past there had been no brethren upon the foundation, and that the present establishment consisted of a master, chaplain and six sisters; that the master, brethren and sisters, had been for many years past seised of the lands and hereditaments in the information particularly mentioned; that, by the will of one William Spink, *asum* [\*462] of 7*l.*, yearly charged and payable as therein \*mentioned, was given for the benefit of the said six sisters and chaplain of the said hospital; and that there were also other sums now remaining in the hands of the defendant, the present master of the hospital, which formed part of the funds of the hospital, and were applicable to the purposes thereof. The information then stated, that the right of appointing the master had, for a long series of years, been exercised by the Archbishop of York for the time being, and that such appointment, ever since the establishment of the Collegiate Church of Rippon, in the year 1606, had been uniformly made by the archbishop in favor of the dean of the said church for the time being, as an augmentation to the revenues of the deanery, which were of small amount: that in the year 1792, the mastership of the hospital was accordingly given to the defendant Waddilove, the Dean of Rippon, who had ever since been, and still was, the master: that the chaplain and sisters had been from time to time appointed by the master for the time being; and that the sisters were poor persons selected by him as fit objects of charity, and that one of them at present received parochial relief: that the principal part of the estates of the hospital had been, for above two centuries past, granted out upon leases for lives, at certain small rents, which had never been raised, but that the leases had been from time to time renewed on payment of fines; and that such leases had been always granted in the name of the master, brethren and sisters of the hospital, and

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under their common seal, although the same had for many years been granted by the master for the time being at his own discretion: that the actual value of the property belonging to the hospital amounted to the sum of 464*l.* annually, and that there was also some valuable timber on the estates: that the master had paid the expense of keeping the buildings of the hospital in \*repair, and also 10*s.* a year to the receiver of the [\*463] rents, and divided a sum of 10*l.* yearly among the five elder sisters of the hospital equally; and that subject to such payments, he had applied to his own use the whole of the rents and profits of the charity estates, including the fines upon renewals, except the rent of a small field adjoining the hospital, let for the sum of 2*l.* 5*s.* a year, which sum was equally divided among the five elder sisters; and that the six sisters had also the use of the apartments in the hospital, and of the produce of the garden.

The information charged that the same proportion of the rents, namely, a sum of 10*l.* per annum, was applied to the use of the sisters of the hospital, at a period when the present reserved rents were the full annual value of the property; and that as such value had increased, and had been received in the shape of fines upon renewals, a proportionate increase ought to have been made in the stipends of the sisters, and some allowance ought to be made for the chaplain. The information then submitted that the present appropriation of the charity funds was inconsistent with the purposes of the foundation, as far as the same could be discovered; and, after stating as a pretence that the defendant, the Archbishop of York, alleged that, by virtue of his office, he was the special visitor of the hospital appointed by the founder, and that the court, therefore, had no jurisdiction over the same, it charged that the hospital had no special visitor appointed by the founder, and that no right of visitation had ever been exercised either by the archbishop or his predecessors; and it prayed an account of the charity estates and a reference to the Master to settle a scheme for the application and distribution of the rents and profits in future.

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[\*464] . \*The several defendants put in answers, admitting the facts stated in the information. The defendant, the Archbishop of York, by his answer, stated his belief that the Archbishop of York for the time being had always had the appointment of the master, and that the master on his election always took an oath to the archbishop, of obedience to him and his successors. He admitted that he had never exercised any visitatorial power.

The answer of the defendant the Dean of Rippon, who was also master of the hospital, denied that the present application of the charity funds was inconsistent with the purposes of the foundation as far as the same could be discovered, or that any directions ought to be given by the court for the regulation of the charity and the future application of its revenues; for the defendant submitted that the present mode of distributing the revenues having been sanctioned by such long usage, ought not now to be disturbed; and, at all events, that the hospital was to be considered as an ancient ecclesiastical endowment, in the patronage, and subject to the visitation and superintendence of the Archbishop of York for the time being, and that the archbishop was to be considered as the special visitor thereof, deriving his right from the founder, and that as such, he was the proper and only person authorized to superintend, and regulate and make alterations in the general conduct and management of the charity.

The *Vice-Chancellor* dismissed the information without calling upon the counsel for the Archbishop of York to argue the case, and the Attorney-General thereupon appealed.

The Solicitor-General (Sir W. *Horne*) and Mr. W. *Brougham* in support of the information.

[\*465] . \*Mr. *Skirrow* for the Archbishop of York.

Mr. *Bagshawe* for the Dean of Rippon.

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The different arguments urged by the counsel for the defendants are adverted to in the Lord Chancellor's judgment.

THE LORD CHANCELLOR:—In this case several conflicting, or, at least, very various grounds have been taken in support of the decree, and, among others, one upon which, if it be not got rid of at the outset, the present decision must be supported, although I have no reason to think it was at all pressed on the attention of the court below. On the contrary, indeed, this first point does not appear to have been made before the Vice-Chancellor, because the party interested in taking and insisting upon it was not heard upon that occasion.

It is urged, that in the seventh section(a) of the 59th of the late king, c. 81, a section which is copied from the former Act (58 G. 3, c. 91, s. 12), this charity is exempted from the jurisdiction of the court, because it has a special visitor. There are, however, two grounds upon which such an argument seems to me to be untenable. First, even if the fact had been so (and for that purpose there must, by the words of the clause, be a special visitor appointed by the founder), that does not exclude the jurisdiction of this court, but would only make what the \*commissioners have here done an irregular proceeding. [\*466] They might inquire respecting the charity, and might give their instructions to the Attorney-General, who, if he thought proper, might still bring the case before me. I have no knowledge of the commissioners, or of the manner in which this information was filed. A stage in the cause will afterwards occur when that circumstance may be material; either when the question of costs comes to be determined, to be answerable for which is the purpose of having a relator named, or when the right of appeal is intended to be asserted. In the latter case, if these proceedings have been regularly instituted under the powers given by the Act of Parliament, the right of

(a) This section (among other things) provides that the Act shall not extend "to any college, free school or other charitable institution or donation or charity whatsoever, which has special visitors, governors, or overseers appointed by the founders."

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appeal is cut off, and the decision of this court is made final and conclusive. All I can do at present is to know that the proceeding is now here; since the Attorney-General may always, if he thinks it for the public interest, file the information *ex officio*.

My second answer to the objection is, that this case does not fall within the exemption in the Act; and I am clear that it does not. I cannot allow it to be stated that such an objection is the legitimate inference to be collected from the principles laid down in *Philips v. Bury*.<sup>(a)</sup> In that case, which is one of great authority, Lord Holt has laid it down, that every incorporated charity must, if ecclesiastical, have the ordinary for its visitor; if lay, the patron. Now all that is proved, and, indeed, contended for, before me is, that the patron is the Archbishop of York. And, no doubt, he is; but it is not thence to be inferred that, because Lord Holt has said, that where the hospital is lay the patron is the visitor, therefore, for default of a special visitor, the patron is a special visitor. The very reverse, indeed, is \*the fact; since he only can be a special visitor who is specially named and appointed by the founder. And such is the language of the statute; for by the seventh section, which exempts certain charities from the jurisdiction of the commissioners, the operation of the Act is confined to such charitable institutions as have no special visitor appointed by the founder. In such cases, to use the language of Lord Holt, the corporation, if spiritual, has for visitor the ordinary, if lay, it has the patron; not the patron appointed as visitor, but the patron taking the office for want of a special appointment. Suppose, for example, the founder should appoint a warden without appointing a visitor; it by no means follows, that because a statute afterwards appoints that person to be visitor whom the founder had appointed to be warden, the person so appointed should become the special visitor; or that from that circumstance, on any reasonable construction, the founder, and not the legislature, should be held to have made the appointment of the

(a) 2 T. R. 346.

visitor. He appointed the warden, and that was all. Upon both of these grounds I am clearly of opinion, that the jurisdiction of this court is not ousted by the Act of Parliament.

The next question is, was this a beneficial interest, or was it a trust? And upon all the circumstances of the case, and upon the whole of the evidence, my opinion is, that it was a trust only. It may be observed that the patron, who clearly is the archbishop, does not seem to put in any claim to it; and though Lord Holt lays it down that the patron is the visitor, there is not a shadow of pretence for holding that the archbishop ever exercised his rights as visitor, but on the contrary, as far as appears, he has repudiated that character. When I recollect, moreover, that the prelates are so jealous, and very properly so jealous, in watching over their \*visitatorial powers and [\*468] privileges, there is a very strong presumption against the existence of the visitatorial power in this instance, and that the archbishop is not in any sense—neither in the sense in which Lord Holt uses the expression when he speaks of a patron being the visitor, nor in the sense of an actual visitor—a person who has been vested with that power. No particular words are necessary to constitute a visitor. Nor can any man doubt what the powers of a visitor are. In practice they are perfectly uncontrolled—of removal, new appointment, variation and alteration. They are, in truth, of a most extensive and arbitrary nature; and in a celebrated case of the Archbishop of Canterbury,<sup>(a)</sup> it was laid down, that in his capacity of visitor, an archbishop may refuse a license; and that the court could do no more than put by *mandamus* the visitatorial powers in motion, which might then move in a directly opposite direction to what the court wished or intended, the visitor being at liberty to pursue his own course without assigning any reason. The visitor has only to move, and then the case is without review. These powers are perfectly well known; and it is therefore singular that it is not pretended that such visitatorial powers were ever used either by the present or by any former archbishop.

(a) 15 East, 117.



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Upon the rest of the case, I am still more at a loss to see how it can be pretended that the principal defendant here, the master of the hospital, has an exclusive beneficial interest in the surplus. He is appointed by the archbishop to be the master. That appointment gives him the mastership, the right to be pearnant of all the profits, and it makes him subject to all the duties; but the question is, does he in his capacity of master take [\*469] \*beneficially or as trustee? On the whole of the evidence, I have no doubt that it would be doing violence to the institution to consider that, in virtue of the appointment, he does anything more than take the profits *qua* master, it being admitted that he does not take them by his institution as Dean of Rippon. When an existing foundation receives a new endowment, which in no respect alters the original constitution, there is no necessity to have a separate appointment to each, if the two are inseparably annexed. In such a case, assuming it to be necessary that the master should have institution and induction, the institution and induction to the deanery would be also institution and induction to the hospital. No such thing, however, is alleged here; but first there is an induction to the deanery, and then there is institution and induction to the hospital, the patronage of the former being all the while vested in the crown.

The revenues must be applied according to a scheme to be approved by the Master; and the dean must be at liberty to carry in proposals, and his suggestions will no doubt be attended to.

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[\*470] \*WARE v. THE GRAND JUNCTION WATER WORKS COMPANY.

1831: 15th March.

Injunction to restrain the Grand Junction Water Works Company from applying to Parliament for an Act authorizing the company to procure its supply of water by means of an aqueduct from the river Colne instead of the Thames, as authorized by the existing Acts under which it was incorporated, refused.

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A court of equity will not, at the instance of a shareholder, restrain a joint stock company incorporated by Acts of Parliament which prescribe its constitution and objects, from applying in its corporate capacity to Parliament, and from using its corporate seal and resources to obtain the sanction of the legislature to the remodelling of its constitution, or to a material alteration and extension of its object and powers.

The right of making such an application is incident to a joint stock company of that description.

BY an Act of Parliament passed in the 51 G. 3 (c. clxix.), and intituled "an Act for confirming certain articles of agreement entered into between the Company of Proprietors of the Grand Junction Canal and certain persons, for supplying with water the inhabitants of the parish of Paddington, and the parishes and streets adjacent, in the county of Middlesex," it was enacted, that certain articles of agreement made between the said Grand Junction Canal Company and one Samuel Hill should be absolutely confirmed; and the said company were thereby empowered and authorized to demise, lease and to farm let unto a company of proprietors who were thereby to be constituted, their successors and assigns, the powers and authorities comprised in the said articles of agreement for the term and upon the conditions in the said articles of agreement mentioned. The Act then proceeded to declare that the persons therein named, being proprietors of shares in the undertaking to be executed under that Act, should be united into a company for the making, completing, improving and maintaining the water works, aqueducts, reservoirs and other works necessary for effectuating the purposes of the agreement before mentioned, and should for that purpose be a body politic and corporate by the name of "The Grand Junction Water Works \*Company," and by that name have suc- [\*471] cession, and have a common seal; and for carrying into effect the said purposes, and constituting and upholding the said works, the new company was thereby empowered to raise by subscription among themselves the sum of 150,000*l.*, in 50*l.* shares, which were to entitle the holders to a proportionate share of the profits of the undertaking; and also (should it be required) to raise a further sum of 150,000*l.* for the purpose of maintaining and completing such reservoirs, aqueducts and other works, upon

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the terms and in the manner therein mentioned. The Act then proceeded to lay down regulations respecting the transfer and disposition of the shares and the general superintendence and management of the affairs of the company; and to make particular provisions for the holding of half-yearly general assemblies, and also for the holding of special general assemblies of the proprietors; and authority was given to the company at such assemblies to order and dispose of the custody of their common seal, and the use and application thereof, and to make rules, by-laws, and orders for the good government of the company, their servants and agents, and for the superintendence and management of the said undertaking, and also from time to time to alter and repeal such by-laws, rules and orders; and it was declared that such by-laws, rules and orders when reduced into writing under the common seal of the company, should be binding upon all the proprietors, provided they were not repugnant to the laws of England or to the provisions contained in that Act.

By another Act (56 G. 3, c. lxxxv.), further powers were given to the Grand Junction Water Works Company with respect to the mode in which the last-mentioned sum of 150,000*l.* might be raised; and it was enacted, that the proprietors of the [\*472] shares thereby \*created, should stand in all respects upon the same footing with the proprietors of the original shares. By a subsequent act (59 G. 3, c. cxi.) the proprietors of the Regent Canal were authorized to supply the reservoirs, pipes and other works of the Grand Junction Water Works Company, for the general purposes and objects of the said company, with water from the river Thames, by the means and according to the powers and regulations therein mentioned; and certain arrangements were sanctioned between the proprietors of the Regent Canal, the Grand Junction Canal, and the Grand Junction Water Works Company for the common advantage of those different corporate bodies.

By another Act (7 G. 4, c. cxl.), which was made to amend the Acts already referred to, the proprietors of the Grand Junction

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Water Works Company were thereby confirmed and established in perpetuity, as a company for making, improving, completing, and maintaining water works, aqueducts, reservoirs, and other works necessary for the purpose of providing and supplying with good and wholesome water from the river Thames, the inhabitants of the several buildings erected and to be erected in the parishes and districts aforesaid; and their character as a body corporate was also confirmed, and power was given to them and their successors, by themselves and their agents, to make, complete, and maintain water works, aqueducts, reservoirs, water wheels, steam engines, pipes and other works necessary for supplying the aforesaid inhabitants with water to be drawn from the river Thames at or near Chelsea, and to supply such water works accordingly with water from the said river to such extent and under such restrictions as were expressed in the said Act of the 59 G. 3, but not further or otherwise. And it was further enacted that all the powers, provisos, \*regula- [\*473] tions, and restrictions, contained in the said Acts of the 51st and 56th G. 3, respectively, except in so far as they were thereby varied or repealed, should continue in force and apply to the Grand Junction Water Works Company thereby incorporated in perpetuity; and the said company was also empowered to apply a certain specified proportion of the gross yearly income derived from the water rents, towards the improvement, extension, or restoration of the buildings, reservoirs, aqueducts, engines, pipes, and other works for the time being vested in the company, or in the purchase, erection or completion of any new or additional buildings, ground, reservoirs, aqueducts, engines, pipes, or other works which should from time to time be thought necessary or convenient for the purposes of the said undertaking.

The bill, which was filed by one of the proprietors, suing on his own behalf only, against the Grand Junction Water Works Company and their clerk, after setting forth the substance of these several enactments, stated that a large sum of money had been contributed by the company of proprietors and had been applied in the construction of the works authorized by the Acts

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in question, which works were now maintained at a heavy expense, and that the undertaking had become profitable: that by means of the water rents levied under the provisions of the Acts a large income had of late years been produced, which was divided among the proprietors in proportion to the number of their respective shares: that the plaintiff had at different times purchased shares in the company, and that previous to the month of November, 1830, he was, and still continued to be, the holder of seventy of such shares; that several of the members of the company, some of whom were now directors, had formed a design to depart from the provisions of the last-mentioned [\*474] Act of \*Parliament whereby the company were empowered to make and maintain the several works therein mentioned for the purpose of supplying the inhabitants of the said parish of Paddington, and parishes and streets adjacent, with water to be drawn from the river Thames, at, or near Chelsea aforesaid, and to supply such water works accordingly, and in lieu of the same intended and proposed to make a new cut or aqueduct from the river Colne, to commence at a place in the parish of Iver in the county of Bucks, and to terminate in or near the parish of Paddington, and to pass through or into a great number of intermediate parishes and townships for the purpose of supplying with water from the said river Colne not only the inhabitants of Paddington, and the parishes and streets adjacent, but also the inhabitants of the several intermediate parishes and townships; and that the said directors and shareholders were desirous to apply to Parliament to enable the company so to do, as well as to obtain authority to raise a further sum of money for making and completing the several works which such purposes would require, and that they were also desirous to apply part of the company's funds in defraying the expenses of applying for, and obtaining an Act of Parliament for such several purposes, and to use the company's name and seal for obtaining such Act.

The bill went on to state the different proceedings which had been taken by the company, in and subsequently to the month

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of November, 1830, for the purpose of prosecuting an application to Parliament for the necessary powers to carry their proposed plan into execution; and it set forth the notices which had been issued to the proprietors previously to the holding of the several meetings at which the proposed plan was taken into consideration. It then stated, that several shareholders who attended such meetings, strongly \*opposed the adop- [\*475] tion of the plan, but that their opposition having been overruled, resolutions were passed, empowering the directors to apply to Parliament in the present session for an Act to amend and enlarge the powers of the company, and to enable the company to form and maintain an aqueduct from the river Colne to London, and to constitute the company a corporation for taking and distributing the waters of that river; and further authorizing the directors to enter into such contracts as they might deem expedient for the purchase of property on the river Colne, or in the line of the intended aqueduct. The bill then stated, that a draft of the proposed Act, which was to effect these objects, had been submitted to the shareholders and been improved by them, and a resolution passed that it should be presented to Parliament.

The bill charged that the defendants intended to proceed forthwith to carry into effect the aforesaid resolutions, and to present and prosecute a petition to Parliament under their common seal for an Act authorising them to make a new cut or aqueduct from the river Colne, and also to expend the funds of the company, and to employ their officers, influence and credit in support of the application, and in entering into contracts, as well as in completing other contracts which they had already made under the authority of the aforesaid resolutions. It further charged, that it would be contrary to the provisions of the now subsisting Acts of Parliament, and injurious to the interests of the plaintiff and the shareholders of the company at large, that such purposes should be carried into effect, or that an Act of Parliament should be obtained with that view; and it charged that a considerable diminution in the value of the company's shares had already taken place in consequence of these proceedings.

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[\*476] \*The bill prayed that the defendants, the Grand Junction Water Works Company, might be restrained by injunction from presenting any petition or making any application to Parliament, and from taking any other proceedings for obtaining an Act to enable them to make any cut or aqueduct from the river Colne, for the purpose of supplying with water either the metropolis or the inhabitants of the parish of Paddington or of any other parishes, hamlets or townships whatsoever, or any company of proprietors already, or hereafter to be authorised to supply such parishes or places, with water, or to enable the said company to construct any reservoirs or other works for the purposes aforesaid, or to raise any sum of money for making and completing such works; and that they might, in like manner, be restrained from using the seal, name, funds, property, credit or officers of the company, in or towards the making such cut or aqueduct, or the constructing of such works, or in support of any petition to or bill in Parliament for the purposes aforesaid, or from employing them, or permitting them to be employed in any manner repugnant to the now subsisting provisions of the said Acts of Parliament, or the purposes for which the company was now established.

The material allegations in the bill were verified by affidavit.

The Vice-Chancellor having, upon argument, made an order for a special injunction in the terms of the prayer of the bill, the defendants now moved for the discharge of that order.

The Solicitor-General (Sir *W. Horne*), Mr. *Pepys*, and Mr. *W. Russell*, in support of the motion.

[\*477] \*The first branch of the injunction cannot be supported, inasmuch as it amounts, in substance, to a positive prohibition against Parliament entertaining the proposed application. Every question raised by the present motion might be fairly and satisfactorily discussed and determined in a committee of the House of Commons. A collision between two

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courts of judicature, and, *a fortiori*, a collision with the legislature, is always to be deprecated and avoided. That part of the injunction has no reference whatever to the employment of the partnership funds, and nothing is to be done by the application to Parliament which can, in any way, make the plaintiff personally responsible. The plaintiff's conduct is merely vexatious, and is probably resorted to for the purpose of extorting money, or inducing the company to get rid of his opposition by purchasing up his interest at an extravagant price. His language to the company is this: "Under your present constitution you have no right to execute the projected extension of your works; and yet you shall not go to Parliament to obtain such an alteration in your constitution as may authorise you to undertake it." If a single shareholder is to be permitted to stop the proceedings taken by the general body of proprietors constituting a public company of this description, with a view to adapt their powers and establishment to the altered wants and condition of the times, a license will be given to the most wanton and intolerable oppression.

The second part of the injunction touches the question of partnership property in a novel and extraordinary way, for it restrains the company from employing their common seal, name, funds and officers in procuring any additional powers from the legislature. Now, it is notorious that no public company incorporated \*by Act of Parliament obtains at once [\*478] all the powers and authorities which it requires; and in the case of this very company, four successive Acts of Parliament have been solicited and obtained, some of which very materially altered the character and powers of its original constitution. The drawing from the river Thames at Chelsea the supply of water which, at an earlier period, had been drawn from the Grand Junction Canal, and in that way incidentally from the Colne, was only directed by the 59 G. 3, and was, therefore, a great departure from the undertaking as at first established; yet no one ever imagined that the company, in applying for the legislative sanction by which that change was introduced, committed a fraud



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upon its members, or sought unconsciously and improperly to violate its original constitution. The substantial object for which the company was incorporated was to supply a certain district of the metropolis with water; and whether that object is attained from one source or another is merely an accidental circumstance, to be determined by considerations of convenience, of which the company, acting upon the resolutions of its members at assemblies regularly convened, is the best, and, by its constitution, the sole judge. The authorities necessary for carrying those resolutions into effect, wherever they involve any change in the machinery of the undertaking, can only be obtained from Parliament; and a Parliamentary committee is the only competent tribunal to which all the arguments against the proposed innovation, derived from its inexpediency, its alleged expense and unprofitableness, and even its inconsistency with the charter, and the breach of faith which it is said to involve on the part of the company, can be properly and effectually addressed. The

Court of Chancery, therefore, so far from being called [\*479] upon to interpose, is bound to stand aloof, and leave the measure to take its regular and constitutional course; *Mayor of Lynn v. Pemberton*.<sup>(a)</sup> In *Natusch v. Irving*,<sup>(b)</sup> which will be cited on the other side, the company was a mere private partnership, not incorporated, and in which the partnership deed contained no clause such as exists in this case, rendering the resolutions of the majority of the shareholders, when formally convened for the purpose, binding on the minority.

Sir *E. Sugden*, Mr. *Knight*, and Mr. *Girdlestone*, jun., in support of the injunction.

It is ridiculous to represent this injunction as an attempt to encroach on the privileges or to interfere with the jurisdiction and authority of Parliament. The order does not pretend to stay any proceedings of the legislature; it operates on the de-

(a) 1 Swan. 244.

(b) Gow on Partnership. App. No. 6, 3d edition.

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defendants merely as parties in this suit, and it depends upon the well established principle according to which any partner who misapplies or perverts the partnership property and credit to his own private purposes, is liable in equity to be restrained. Here the purposes of the Act of Parliament which the influence and funds of the company are to be employed in soliciting is totally dissimilar, or it may be diametrically opposed to the purposes for which the company was instituted and incorporated. Under the subsisting Acts, the Grand Junction Water Works Company is an undertaking for supplying Paddington and the parts adjacent with water taken from the river Thames at Chelsea; whereas it is now proposed to convert it into a scheme for constructing and maintaining an aqueduct from the river Colne, a distance of twelve or fifteen miles, and \*sup- [\*480] plying all the intermediate country as well as the north-west extremity of the capital with water conveyed along that aqueduct. As incidental to the plan, the company are to become the proprietors of corn mills and paper mills, and rights of fishing, and to make purchases of lands and buildings, upon which a large portion of their capital must of course be sunk.

Suppose, instead of water works, this had been a canal, and the project was, as in a case very recently before the Vice-Chancellor, (a) to drain off the water and \*lay a [\*481]

(a) For the following note of the case alluded to, the reporters are indebted to Mr. Booth.

CUNLIFF v. THE MANCHESTER and BOLTON CANAL COMPANY.

1831: 10th February.

The bill was filed by the plaintiff (a shareholder suing only on his own behalf) against the company, which was incorporated by a local Act of Parliament, to restrain the company by injunction from affixing the corporate seal to a petition to Parliament for an Act to convert a portion of the canal into a railway, and from applying any of the corporate funds to the proposed object.

The Vice-Chancellor offered to give the defendants time to answer the affidavits, on condition that they would take no steps in the meantime. The counsel for the company rejected the offer, and contended that there was no equity for such relief as the bill prayed. His Honor, however, expressed a different opinion, and granted the injunction.

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rail-road along the bottom, so as to convert the canal into a railway for the conveyance of goods and passengers in steam carriages, will it be maintained that such an alteration would be legitimate and proper, or that all the shareholders would be bound to acquiesce in it when sanctioned by the votes of a majority? His Honor was of a different opinion, and at once granted an injunction. That, it will be said, was a strong case; but where is the line to be drawn? Where are such projects to end, or how are the hapless shareholders, who are entangled in them by their more adventurous or speculating partners, to escape from the serious responsibility which may thus be entailed on them? The plaintiff has purchased shares relying on the faith of this being a company having a certain definite purpose and constitution, established and prescribed by Acts of Parliament; and he now finds that the whole of the corporate influence, credit and resources of the company, are to be employed in procuring the sanction of the legislature to a fundamental change in that purpose and constitution. Against such an application, so supported, what chance has a solitary shareholder of waging in Parliament a successful opposition? And even if he succeeds there, to what quarter is he to look for indemnity either against the expenses which he must himself incur in the struggle, or against the depreciation which the [\*482] heavy costs of a contest in \*Parliament must of necessity occasion in the value of his shares?

*Mr. Knight and Mr. Duckworth*, for the plaintiff.

*Sir C. Welherell and Mr. Booth*, for the defendants.

The company had not time to appeal without running the hazard of losing the Parliamentary session, and they therefore came to a compromise with the plaintiff, who, thereupon, abandoned the suit.

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A few days afterwards, a bill was filed by one Maudsley against the same company, and for a similar object.

The defendants filed a demurrer, which the Vice-Chancellor overruled. The company then put in an answer, and the cause was subsequently heard on the merits, and the suit dismissed with costs.

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The argument, drawn from the expensive nature and doubtful utility of the proposed scheme, as well as from the breach of faith which it involves towards persons holding substantial interests in the company as now constituted, may all, it is said, be urged with equal effect before a Parliamentary committee; but they cannot be submitted to that tribunal at the same comparatively moderate cost, and with the same certainty of receiving a patient and impartial consideration, or a prompt and final decision, as in this court. Undoubtedly a Parliamentary committee may entertain and act upon considerations of this description; but that is no reason for depriving the Court of Chancery of its concurrent jurisdiction, especially as the latter court has first obtained possession of the subject, and is, besides, much better fitted to investigate and determine questions of so delicate and complicated a nature. If this were the case of a private partnership in which some of the partners were applying for an Act of Parliament to extend or vary the powers of the company under their deed of partnership, the court would at once interpose on the ground of the flagrant breach of faith which they were committing against the dissenting partner; and the circumstance that this is a joint stock company, the constitution of which has been solemnly settled by Acts of Parliament, rather strengthens than weakens the ground for interposition. That was the deliberate opinion of Lord Eldon in the case of *Natusch v. Irving*, which is a strong authority for the present injunction, and is perfectly reconcilable with the doctrines laid down by the same judge in the subsequent case of *Mayor of Lynn v. Pemberton*.

\*THE LORD CHANCELLOR:—This injunction consists [\*483] of two branches, which are manifestly and widely distinguishable; the one over-riding and embracing the whole of the introductory and concluding portion of the order; the other, being the part which lies between them, and being of comparatively small importance. The first branch refers exclusively to the steps which may be taken by the company with a view to obtain a new Act of Parliament authorizing the proposed alterations in their undertaking; the second merely restrains them

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from proceeding to carry those alterations into execution, independently of such legislative sanction, or from using, or permitting to be used, the seal, name, funds, credit and officers of the company, with a view to effect any such purpose under their existing constitution.

I am glad that the subject, which is one of great importance, has been fully discussed. The opinion I have formed is against the injunction as far as regards the first and last parts of the order; but, as far as regards the intermediate portion, I shall permit it to stand.

It is quite idle to represent this, as was at first sought to be done, as an attempt to restrain by injunction the proceedings of the High Court of Parliament. This is no injunction to restrain any proceedings of Parliament, or to restrain any parties who may be called upon by the authority of Parliament from intervening in such proceedings. It is simply an injunction to restrain a partnership, now existing under a certain constitution, from doing any act in its corporate capacity with a view to obtain a new modelling of that constitution, say an extension, or a variation, or even a total change of it. [\*484] \*I am of opinion that the right to take proceedings in Parliament, in the way that is proposed, is incident to a corporation of this nature; at the same time fully admitting that the shareholders are certainly not entitled to do anything which the partnership prohibits, or which those Acts of Parliament, which, in truth, constitute their deed of partnership, give them no authority to do.

Although, therefore, I am now disposed to support the injunction as to all such acts as are not authorized by the present constitution of the company, I will not interfere to restrain the company, *qua* corporate body, from applying to the legislature and obtaining a change in its constitution, which will put those Acts of Parliament upon a different footing, by extending its powers or by substituting a new body for the old. I can see

nothing in the nature of a corporate body of this description to prevent that body from so dealing with itself, and asking for such an extension or variation of its constitution. A corporation may apply to the crown for a new charter; and the new charter, when accepted, binds the corporation and gives it a new existence. And why may not such a body as this in like manner apply to Parliament for an alteration and extension of its powers? It was said that if corporate bodies of this description are allowed to make such an application, those who rely on that constitution are deceived, because they come in upon the faith and footing of its being a partnership of a certain kind, and now it is sought to be materially varied. But are not a man's eyes open to the fate that attends him when he enters into a partnership with a body of this kind? Does he not know that he is liable to this contingency, and either that the company ought to have the power of obtaining an alteration in its constitution, or that he ought to come in as a member of it under certain conditions and restrictions?

\*All the arguments used here touching the great [\*485] change to be effected by the new project—that the change is as great as if, instead of a canal, there was to be an application to convey by steam upon a railroad—that it is likely to ruin the proprietors, and the like—are still open to the plaintiff before a committee of the House of Commons or House of Lords. There is not a single individual, who fancies himself aggrieved by the proceedings, who may not apply in person before that tribunal, and, by his agents, counsel and witnesses, oppose the passing of the bill into a law. Is not that the old, regular, and constitutional mode, and is not this a new and an irregular mode of proceeding? If this application is listened to, every time a new Act of Parliament is applied for by a body, consisting, like this water company, of 600 or 700 proprietors, if a single member chooses to differ from the rest (and, indeed, but for that very difference the intervention of Parliament would, in most cases, be unnecessary) before the corporate seal can be carried to Westminster at the foot of a petition by the company

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praying for an extension of its powers, the matter must first be discussed here upon an injunction bill; and, if it survives the injunction bill, then, and not till then, will it come to its proper tribunal. I, for one, am not prepared to open this door to litigation. There never was so wild a dream as to imagine that, by refusing this motion, I shall overturn a decision of Lord Eldon's in *Natusch v. Irving*. I am rather, in fact, affirming that decision; but if I upheld the whole of this injunction, I should be going against the principle of the case of the *Mayor of Lynn v. Pemberton*. The language of Lord Eldon's judgment in the latter case(a) plainly shows that he could not have done what he is represented as having done in *Natusch v. Irving*.

[\*486]     \*It is said that this is an attempt on the part of the company to do acts which they are not empowered to do by the Acts of Parliament. So far, I restrain them by injunction from any conversion or application of their funds that is not authorized. But that is not what the plaintiff now asks; for he asks me to restrain them from doing that which will make, what they propose to do, a lawful act.

It is urged that one partner has been restrained from accepting and indorsing bills, the produce of which is intended to be applied to what are not partnership purposes or transactions, and that the present is the converse of that case. But that argument proves a great deal too much. There the restraint is imposed upon one partner; here it is conceded the object is to restrain every one of the partners, whether they amount to one hundred or a score. Now the Act of Parliament will, if it is procured by any one, be binding upon the whole body, however much the others may reclaim against it. And yet it is not pretended that such an injunction could be granted to restrain one. This is sufficient to show the wide distinction that exists between restraining the Act which is here sought to be performed, and restraining an individual partner from doing acts which are contrary either to the express or implied contract of partnership.

(a) 1 Swan. 251.

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The dealings between the parties, and the whole of the objections, are still open in the proper place. With the trifling exception adverted to, therefore, the injunction must be dissolved.

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TUBBS v. BROADWOOD.

[\*487]

1831: 5th and 9th March.

Where a tenant for life sells part of the settled estate under the authority of an Act of Parliament which directs him to lay out the consideration money in the purchase of other lands, and to settle them to the same uses, and he afterwards purchases lands in fee simple, to nearly the amount, but dies without having settled them accordingly, leaving them to descend upon his heir at law, who was also the first tenant in tail in remainder under the settlement, a court of equity will intend that the purchase was made in performance of the obligation imposed by the Act, and will not permit the remainderman to recover the value of the lands sold against the personal estate of the tenant for life.

UNDER a will made in the year 1772, certain lands and a messuage situate at Acton, in the county of Middlesex, were limited to Robert Tubbs the elder for life, without impeachment of waste, with remainder to his first and other sons successively in tail, with divers remainders over. Robert Tubbs the elder soon afterwards entered into possession of the lands so devised to him, and continued in the possession and enjoyment of them till the month of August, 1818, when he died, leaving the defendants, Broadwood and others, his executors, and the plaintiff, Robert Tubbs the younger, his eldest son and heir at law. On his father's decease, the plaintiff, having become tenant in tail in possession, suffered a common recovery, and acquired the fee or the settled estate.

By three several Acts of Parliament passed in the years 1793, 1795, and 1805, respectively, the Grand Junction Canal Company was empowered to purchase lands necessary for their navigation, upon the valuation of commissioners, or of a jury, in the manner therein mentioned, from the owners of such lands,



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having an estate therein not less than an estate for life; and it was further provided that the canal company should pay to such owners compensation for any damages that might be done by their acts or works to such lands; and it was directed that the amount of the purchase money of such lands, [\*488] and also of such compensation, \*where compensation was awarded, should be laid out by the owners thereof in the purchase of other lands in fee simple, which were to be settled to the same uses as the lands sold or damnified had been subject to; and that till such investment was made, the amount of such purchase money and compensation should be placed in the public funds or put out on real security, and the interests and dividends thereof be paid to the persons who for the time being would be entitled to the rents and profits of the lands so to be purchased.

In the year 1800, the canal company, under the powers conferred by the two first mentioned Acts, purchased from Tubbs the elder a part of the settled estate of which he was tenant for life in possession, at the price of 660*l.* 18*s.* 9*d.*, which they paid to him, taking, at the same time, a conveyance from him in the form prescribed by the Acts. In the month of May, 1802, the company in like manner paid to Tubbs the elder a sum of 186*l.* 5*s.* 8*d.* for damages done to the settled estate by the works of the navigation; and, in the month of October, 1805, they paid him a further sum of 595*l.* 14*s.* 3*d.* by way of compensation for other damage done by their works to that estate.

The bill was filed by Robert Tubbs the younger, alleging that, on coming into possession as tenant in tail of the estate on the death of his father, he had not been able to find any lands purchased, or any sums invested on account of the aforesaid several payments made to his father by the canal company, according to the directions and provisions of the Acts of Parliament, and praying that he might recover the amount of the sums so paid with interest, or the value of the stock which, if duly [\*489] invested, those sums would have produced, \*either from

the defendants the canal company, or from the other defendants the executors of his father.

The defendants the executors, by their answer, admitted that the several sums of 660*l.* 18*s.* 9*d.*, 186*l.* 5*s.* 8*d.*, and 595*l.* 14*s.* 3*d.* had been paid to their testator as alleged in the bill; but they stated that the first sum only had been received by him as the purchase money for the sale of land in settlement, and that of the other sums 142*l.* 17*s.* 10*d.*, or, according to another statement, 163*l.* or thereabouts were the amount of costs and expenses incurred by him in his proceedings with the canal company, and that the residue had been paid to him by way of compensation for temporary damage done to his life interest. The answer further stated that in May, 1709, Tubbs the elder purchased the fee simple of a small piece of land abutting on the settled estate, and only separated from it by a common fence, for the sum of 389*l.* 18*s.*, including therein the value of the timber, and the costs of the conveyance; that he thereupon took possession of it, and annexed it in enjoyment to his adjoining property; that he also entered into a verbal contract with certain commissioners under an Inclosure Act for the purchase from them, at the price of 385*l.* 18*s.* 6*d.*, of several detached plots of ground lying contiguous to the lawn of his mansion house; and that, having got possession of these plots, he took down the boundaries and threw them all into his lawn, surrounding the whole with one inclosure; that the price of the latter purchase was not paid till after his death, by the defendants as his executors; and that, by virtue of a special provision in the Inclosure Act, the receipt which they then obtained from the commissioners for the money, amounting with the costs to 392*l.* 11*s.*, which receipt they had forthwith delivered \*to the plaintiff, of itself [\*490] without any conveyance, vested the fee simple of the land in the plaintiff. The defendants farther admitted that, according to the provisions of the Acts of Parliament, their testator was bound to lay out the first-mentioned sum of 660*l.* 18*s.* 9*d.* in the purchase of lands to be settled; but they submitted that, under the circumstances, the purchase of May, 1809, must be

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intended to have been made in performance of that obligation, and that as to the other sums no such obligation existed, inasmuch as these were paid for temporary damages and costs, and not for damage done to the inheritance.

The evidence in the cause having established the case made by the executors in their answer, his Honor, the Vice-Chancellor, at the hearing, dismissed the bill with costs as against the Grand Junction Canal Company, and without costs as against the executors.

The plaintiff now appealed against his Honor's decree, so far as it dismissed the bill against the executors.

Mr. *Temple*, for the plaintiff, contended that, inasmuch as it was admitted that 1,440*l.* or thereabouts had been received by the tenant for life, while no more than 1,232*l.* (even giving to his estate the benefit of the second purchase, contrary to the defence set up by the answer) had been laid out by him in land, it was impossible to intend that his purchases were made in performance or part performance of the obligation which the Acts of Parliament imposed; more especially as the purchase from the commissioners had not been completed till after his decease. The evidence, indeed, attempted to show that a sum greater than the whole of the money received from the canal company as the \*price of the property in settlement, had [\*491] been afterwards expended by the tenant for life in buying other lands, which he had allowed to descend upon the plaintiff; but the sum which was alleged to have been paid him for damages, was not proved to have been paid in respect of what was termed temporary damage—a distinction not noticed in the Acts of Parliament; and, even if what appeared to have been the amount of his costs were deducted from the total, there would still remain a sum of 65*l.* unaccounted for, clearly showing that, as far as the testator's intention was to be regarded, he made those several purchases entirely without reference to any supposed obligation on his part. The doctrine of implied satis-

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faction or performance, besides, had never been extended to a case where the duty was imposed, not by the covenant of the party himself, but by the provisions of an Act of Parliament. Tubbs the elder stood in the situation of a wrongful possessor rather than a covenantor; and whatever might be the moral duty of making restitution, as the obligation was neither a legal nor an equitable one, the court would not presume an intention to discharge it. If he had meant the purchase to be a performance of the statutory provision, he would have directed the newly purchased lands to be conveyed to the uses of the settlement, or have invested the produce of the sales and the compensation money in the funds; but he had done neither. Suppose the heir at law and tenant in tail had been different persons, and the tenant for life had died leaving specialty creditors, would this court have restrained such creditors from proceeding against the purchased lands, and interfered for the benefit of the tenant in tail? At any rate, the plaintiff was entitled to an inquiry as to the difference between the amount of money received, and of the money laid out.

\*Mr. Tinney and Mr. Merivale, *contra*, relied upon the [\*492] cases of *Lechmere v. Lechmere*,<sup>(a)</sup> *Sowden v. Sowden*,<sup>(b)</sup> and *Denton v. Davies*,<sup>(c)</sup> especially the two former, as entirely disposing of the plaintiff's claim; and they contended that the principle of the doctrine of performance equally applied, whether the obligation was imposed by the specific covenant of the party, or by his entering into a contract of which the obligation was made an express term by the provisions of an Act of Parliament. Conceding, for the argument's sake, (although the evidence by no means required the concession), that the sum paid for damages, as well as that received for the property sold, ought to have been laid out in another purchase, the amount of the costs was still to be deducted from the total; and then the difference

(a) Cas. T. T. 80; 3 P. Wms. 211.

(b) 1 Bro. C. C. 582; 1 Cox, 165.

(c) 18 Ves. 499.

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between the amount of the testator's receipts and outlay became so trifling (upon the plaintiff's own statement not more than 65*l.*) that the court would presume that the discrepancy arose from surface damages or costs which had not been taken into the account, and would not, after the lapse of so many years, permit any inquiry to be gone into on the subject.

Mr. Temple, in reply.

THE LORD CHANCELLOR :—I have heard nothing to shake the opinion which I formed when I heard the case opened, and, therefore, I have not called upon the defendant's counsel to go at large into the question arising upon the point of law: It may be true, as has been strongly pressed by \*the [\*498] plaintiff's counsel, that this is the first time in which the doctrine of *Lechmere v. Lechmere*,<sup>(a)</sup> has been carried beyond the case of covenant; but the principle of that case is directly applicable to the present. The whole doctrine proceeds upon the ground that a person is to be presumed to do that which he is bound to do; and if he has done anything, that he has done it in pursuance of his obligation. In this case an Act of Parliament calls upon the tenant for life to invest in real estate, or in the funds, for the benefit of the next in remainder, all sums which he shall receive for lands sold under the provisions of the Act. Here the tenant for life first received 660*l.*, and afterwards laid out 839*l.* 18*s.*, including therein the price of the timber, in the purchase of other lands lying in the immediate neighborhood, of easy, convenient and profitable occupation with the lands still remaining in settlement; and it is a circumstance which may fairly be said to strengthen the presumption on which the doctrine rests, that the newly acquired land is valuable and useful with a view to the enjoyment of the other property comprised in the settlement. The tenant for life subsequently contracted for a second purchase, to the amount of 392*l.* 11*s.*, making an aggregate sum of 1232*l.* 9*s.* laid out. Can it be denied that, strictly

(a) Cas. T. T. 80; 3 P. Wms. 211.

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upon the principle of that doctrine, this act must be taken to have been done by the tenant for life, with reference to his obligation? What does it signify whether the obligation arises out of a covenant, or under the provisions of a statute? Even taking this as a private Act of Parliament, still that comes within the description of a conveyance; and, if a person is bound by his conveyance, is not this as good an obligation as a covenant inserted in the instrument would have been? But if a man is bound by his conveyance, is it not \*equally ob- [\*494] ligatory upon him to do that which is parcel of his conveyance, as to perform his covenant? If a person, by the provisions of an Act of Parliament, disposes of lands, and, by the condition under which he receives the price, is bound to lay out the money in other lands to be settled to the same uses, the presumption is, that what he did in laying out that money was done with reference to his pre-existing obligation.

Upon the other question respecting the damages, if the sum of 163*l.* charged for expenses be deducted, there remains a balance of 618*l.*, and allowing, what upon the evidence is not very likely, that the whole of the balance was paid for permanent damage done to the inheritance, that would leave a total of 1278*l.* to be laid out by the tenant for life. Now it is admitted that he has laid out 1232*l.*, leaving a difference of only 56*l.* unaccounted for; and am I to assume, upon this trifling discrepancy, that this is incorrect, and, by sending the matter to inquiry, substantially to reverse the judgment? I have no doubt whatever that this small sum may have been temporary damage; and I will not, therefore, on this point reverse the decree, and send it to the Master, merely for the purpose of ascertaining whether this sum of 56*l.* was or was not compensation paid for the amount of temporary damage.

Appeal dismissed without costs.

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Devaynes v. Noble.

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## [\*495] \*DEVAYNES v. NOBLE—BARING v. NOBLE.

1831: 2d, 8th and 9th March.

The creditor of a partnership, in which one of the partners dies, and the surviving partners afterwards become bankrupt, has a right to resort to the assets of the deceased partner for payment, without regard to the state of the account as between such deceased partner and the surviving partners.

WILLIAM DEVAYNES was, at the time of his death, which happened in November, 1809, a partner in the banking house of Devaynes, Dawes, Noble & Co., of London, in which Devaynes himself, Dawes, Noble, Croft and Barwick were the individual partners. After his decease the concern was carried on by the surviving partners under the same firm, but on their own proper account, the estate of Devaynes having no longer any interest therein; and they continued to conduct it till the 30th of July, 1810, when a joint commission of bankrupt was issued against them.

The first bill, which was filed soon after the bankruptcy against the executors and devisees in trust of Devaynes' will, and against the assignees of his former partners, sought to have the accounts taken of the testator's estate, and the trusts of his will executed. The second was a creditor's bill, filed by two persons (Sir T. Baring and Sir F. Standish), who had been creditors of the banking house at the time of Devaynes' death, and whose debts had not been satisfied or extinguished by the effect of any subsequent dealings with the new firm carried on by the surviving partners. It was filed against the personal representatives and devisees in trust of Devaynes' will, the persons beneficially entitled under that will, and the assignees of his bankrupt partners: and its main object was to establish the full amount of the plaintiff's demands against the real and personal estate of Devaynes, which was a solvent estate,

[496] \*leaving Devaynes' personal representatives to their remedies over against the estates of his surviving partners upon the winding up of the partnership accounts.

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The substantial question raised in the second suit was, whether the creditor of a partnership in which one of the partners subsequently died, and the surviving partners had afterwards become bankrupt, had an absolute and unconditional right to resort at once, for payment of his debt, to the assets of the deceased partner.

By the decree made on the original hearing by Sir W. Grant in both causes, the Master was directed in the second suit to take an account of what was due at the death of William Devaynes, deceased, from the partnership of Devaynes, Dawes, Noble, Croft & Barwick to the plaintiffs, and all such other persons as were creditors of the partnership at the time of the death of Devaynes, and also of what was due, at the time of making the decree, from the partnership to such creditors, and to inquire whether such creditors or any and which of them continued to deal with the surviving partners after the death of Devaynes, and what sums of money were paid by the surviving partners to such creditors respectively from the death of Devaynes to the bankruptcy, and what had since been received by them respectively; and also whether such creditors, or any and which of them, had by such subsequent dealings released the estate of Devaynes from the payment of their respective debts, or what (if anything) remained due in respect thereof.

The particular nature of the debts claimed by the different classes of creditors who came in and sought the benefit of this decree, was particularly specified and distinguished in the Master's report. The claim of the \*plaintiff Baring, [\*497] and the circumstances out of which it arose, are fully stated by Mr. Merivale in his report of *Baring's Case*.(a) That of his co-plaintiff Standish, in its general nature and circumstances, fell within that class of debts ranged by the Master's report under the description of *Clayton's Case*.(b)

(a) 1 Mer. 611.

(b) 1 Mer. 572.



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The main question raised by the second suit, together with many subordinate points, was afterwards elaborately argued at the rolls before Sir W. Grant upon exceptions to the Master's report,<sup>(a)</sup> when his Honor adhered to the principle of his first decree, and in effect decided that a partnership contract is, upon the death of a partner, to be considered as joint and several, and that where the surviving partners are insolvent, a creditor has a right to resort to the estate of the deceased partner, without regard to the state of the accounts as between him and the surviving partners.<sup>(b)</sup>

Two separate petitions of appeal, by parties interested in Mr. Devaynes' estate, were presented against the whole of the original decree, and against the several consequential orders by which the effect of it was to be worked out. The appeals were thrice argued; first before Lord Eldon, again in December, 1829, before Lord Lyndhurst, both of whom resigned the Great Seal without delivering judgment, and now, for the third time, before Lord Brougham.

Mr. Knight and Mr. Purvis, Sir E. Sugden and Mr. Koe, for different parties interested in supporting the decree.

[\*498] \*No doubt can be entertained, that the continuing partners of the firm were insolvent, for the joint commission of bankruptcy is *prima facie* evidence of their insolvency, and throws upon the party who disputes it the burden of proving the contrary. Insolvency in law is the best proof of insolvency in fact, and so it was considered by the eminent judge who pronounced this decree. The fact, however, is really immaterial. The plaintiffs' debts, being debts due from the partnership as originally constituted, are joint and several debts of all the partners; and although where debtors are severally bound to an individual for the same debt, the presumption is, that before the

(a) 1 Mer. 530.

(b) See in particular *Sleech's Case*, 1 Mer. 539.

creditor proceeds against the estate of one who is deceased, he will first exhaust the estates of the survivors whom he can reach by action, this is not essential as a preliminary step; he is at full liberty, at his own discretion, to go against any one of them for the whole. That would be his right at law; for the accidental circumstance that one of them is dead, which compels him to seek his remedy against that one in equity, cannot alter the nature of his rights; and this court enables him to work out those rights, by its own peculiar machinery, against the assets of his deceased debtor, as effectually as a court of law would have done had the debtor been alive. This doctrine is strongly illustrated by the conduct of courts of equity in the case of bonds upon which, either from a defect in form, or from the death of some of several co-obligors, the obligee is unable fully to enforce his demand at law. In such cases the rule is well settled, that wherever the consideration given for the bond has been paid to all the obligors, in other words, where the benefit has been shared by them all, the obligee shall be at liberty to proceed at his discretion against the separate estates of each; nor is he required to show that he has previously resorted to and exhausted his legal remedies. \*This doctrine, which is founded [\*499] in common sense and justice, resting as it does on the principle of effectuating the real interest of the contracting parties, was recognized at a very early period, and has been uniformly followed and approved; *Lane v. Williams*,<sup>(a)</sup> *Bishop v. Church*,<sup>(b)</sup> *Thomas v. Frazer*,<sup>(c)</sup> *Burn v. Burn*.<sup>(d)</sup>

Precisely the same rule applies, and for the same reason, to the case of partners with respect to the partnership debts. At law, it is true, partners who die get rid of their partnership liabilities; but in equity those liabilities are considered as several and subsisting, and they may, therefore, be enforced upon a bill against the representatives. A court of equity holds it to be unjust that the estate of a partner who has had the benefit of a joint contract, should, by the accident of his death, be released from the obliga-

(a) 2 Vern. 277, 292.

(b) 2 Ves. sen. 100, 371.

(c) 3 Ves. 399.

(d) Ibid. 573.

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tion which formed a part of the consideration given to the other contracting party. This principle, applied by the Lord Keeper in *Holstcomb v. Rivers*,<sup>(a)</sup> and by Lord Hardwicke in *West v. Skip*,<sup>(b)</sup> (a case which approaches very closely to the present), has been repeatedly recognized and sanctioned by Lord Rosslyn and Lord Eldon; *Daniel v. Cross*,<sup>(c)</sup> *Stephenson v. Chiswell*,<sup>(d)</sup> *Gray v. Chiswell*,<sup>(e)</sup> *Ex parte Kendall*.<sup>(g)</sup> In the case last referred to, the language of Lord Eldon is clear and express. The same great judge has, on several subsequent occasions, distinctly sanctioned the doctrine upon which the decision under appeal is founded; *Vulliamy v. Noble*,<sup>(h)</sup> *Cowell v. Sikes*:<sup>(i)</sup> [\*500] \*and Sir W. Grant himself, who is erroneously supposed to have made this decree without much consideration or argument, deliberately restated and followed out the principle, not only in the later stage of *Devaynes v. Noble* itself, upon the hearing of the exceptions, but also in his able judgment in *Sumner v. Powell*.<sup>(k)</sup> The decree, therefore, now sought to be reversed, is equally supported by principle and authority; and the only case, *Hoare v. Contencin*,<sup>(l)</sup> which seems to be inconsistent with it, if it be anything more than a *dictum*, cannot now be considered as law.

Sir C. Wetherell and Mr. Treslove, Mr. Spence and Mr. Cockerell, Mr. Pepys and Mr. Follett, for different parties who appealed.

The cases in which joint liabilities have been construed as if they were joint and several, such as *Bishop v. Church*, *Burn v. Burn* and *Thomas v. Frazer* have no application. The relief administered in such cases is grounded simply on mistake, the intention having been to constitute a legal demand originally both against the deceased person and the survivor, and the court only

(a) 1 Ch. Ca. 127.

(b) 1 Ves. sen. 239. S. C. nom. *Skipp v. Harwood*, 2 Swans. 586.

(c) 3 Ves. 277.

(d) Ibid. 566.

(e) 9 Ves. 118.

(g) 17 Ves. 514.

(h) 3 Me. 593.

(i) 2 Russ. 191.

(k) 2 Mer. 30.

(l) 1 Bro. C. C. 27.

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giving effect to what was the real intention of the parties, as it would have done upon a bill to correct the form of the security had the deceased party been alive. But where such an intention did not exist, or where there was no joint liability antecedently, the court will not interfere to give the creditor a remedy for which he has not contracted, and which the nature of the transaction proves that neither party had in contemplation: *Sumner v. Powell*.(a)

\*The decree under appeal differs from all those which [\*501] have been relied upon as precedents in this very material circumstance, that it at once declares the liability of Mr. Devaynes' estate to the whole amount of the plaintiff's claim, without its being proved or declared that the assets of the surviving partners are insufficient, and without having the extent of the deficiency ascertained. In that respect it goes far beyond *Daniel v. Cross*,(b) the case in which the principle is supposed to have been first asserted; for it appears on examining the Registrar's book that, in *Daniel v. Cross*, the plaintiffs had previously gone in and proved their debts, under the commission, against the estate of the surviving partners; but that inasmuch as that estate would not be sufficient to pay them in full, they claimed by their bill to receive the balance out of the assets of the deceased partner. *Daniel v. Cross* therefore really decided nothing more than the earlier cases, which had long before established the liability in equity of a deceased partner's estate to discharge the partnership debts, in the event of the creditor having lost or exhausted his remedy against the estate of the surviving partner, upon whom the joint assets and obligations devolved at law. But before that equity can be set up, it is necessary to show, as a previous condition, that recourse has been had without effect to the party who is the legal debtor; and, accordingly, in all the cases that have been referred to, not excepting *Daniel v. Cross*, that distinction will be found to have existed. In *Holstcomb v. Rivers*,(c) the earliest case upon the subject, all that was actually

(a) 2 Mer. 30, and Turn. &amp; Russ. 423.

(c) 1 Ch. Ca. 127.

(b) 3 Vea. 277.

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determined was that the surviving partner should account, the executors of the deceased factor, his copartner, not having been made parties to the suit. In *Lane v. Williams*,<sup>(a)</sup> it [\*502] appears from the Registrar's \*book that Newberry, the partner by whom the note was given, and who had survived his copartner, and was liable at law to pay the debt, had absconded, and was in contempt to a sequestration. The case therefore only decided that where the debtor has exhausted his remedies against the surviving partner, he may then, but not till then, go against the representative of the deceased partner. In *West v. Skip*,<sup>(b)</sup> the surviving partner is treated as a trustee, so far as the interests of the deceased partner are concerned; liable in the first instance to pay the joint debts, and entitled, should the joint assets prove deficient, to be relieved out of the assets of the deceased partner. It is only where the survivor is compelled to pay more than his proportion, that he has any equity to come upon the estate of his deceased partner for relief. The same view of the relative situation of deceased and surviving partners, in reference to the administration of assets, is taken in *Jacomb v. Harwood*,<sup>(c)</sup> *Hankey v. Garrat*,<sup>(d)</sup> and *Ex parte Williams*.<sup>(e)</sup> In *Ex parte Williams*, Lord Eldon seems to have considered that it is only through the operation of administering the equities as between the partners themselves, that the joint creditors, in the case of a partner who dies, have an opportunity of making their claims effectual against his estate. The observations of Lord Eldon, in *Gray v. Chiswell*,<sup>(g)</sup> are also strongly applicable to the present question. That was the case of a claim made in a suit for the administration of Chiswell's estate after his decease by certain of the joint creditors of Chiswell and Nantes, who had proved their debts under a commission against Nantes the surviving partner. Lord Eldon there said, speaking of those creditors—\*“They have had their demand effectuated against the joint estate surviving; and now contend, that by the accident of the death, they shall be, not only upon an equal, but

(a) 2 Vern. 292.

(b) 1 Ves. sen. 239.

(c) 2 Ves. sen. 265.

(d) 1 Ves. jun. 236.

(e) 11 Ves. 3.

(g) 9 Ves. 118.

upon a better footing, as against the separate creditors, than it the party had lived, and had become a bankrupt. It would be extraordinary to say that." It is clear from this passage in his judgment, that Lord Eldon never conceived that joint creditors could have a right to resort to the estate of a deceased partner until they had done everything in their power to make good their demands against the joint estate, and that even then their demands against the separate estate of the deceased partner must be postponed to the separate debts of that partner. Even in *Ex parte Kendall*,<sup>(a)</sup> which was a petition in the bankruptcy of this very partnership, and in which Lord Eldon seems to have recognized the right of the joint creditor in certain circumstances to resort to the assets of the deceased debtor, he speaks of the equity in terms of great doubt and surprise, as Lord Thurlow had previously done in *Hoare v. Contencin*;<sup>(b)</sup> and, putting the case of an application by a creditor of the five original partners (the very case which this bill seeks to establish), he expressly says, "the answer to that application might be, admitting his right, that he should first go in and prove against the estates of the four."<sup>(c)</sup> It is clear, therefore, from the language of Lord Eldon both in *Gray v. Chiswell* and in *Ex parte Kendall*, that the mere circumstance of the bankruptcy of the surviving partners, did not, in his opinion, relieve the joint creditor from the obligation of seeking his remedy in the first place against those who were his debtors at law. In *Vulliamy v. Noble*,<sup>(d)</sup> another case arising out of the liabilities of this same \*partnership, the [\*504] decree was that, subject to the set-off, the debt should be proved against the estate of the bankrupts, and that the amount of the deficiency only should be charged upon the estate of Devaynes. The decision in *Cowell v. Sikes*,<sup>(e)</sup> proceeded upon the fact of a clear deficiency of assets, it being distinctly proved that there were no joint assets to answer the demand. All these cases show that, even if the equity exists, which, upon the authorities it is submitted, is extremely questionable, the equity is of a secondary

<sup>(a)</sup> 17 Ves. 514.<sup>(d)</sup> 3 Mer. 593.<sup>(b)</sup> 1 Bro. C. C. 27.<sup>(e)</sup> 4 Russ. 191.<sup>(c)</sup> 17 Ves. 521; and see p. 525, 526.

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kind, and cannot arise or be made available until the joint estate of the surviving partners has been resorted to and exhausted; and then only to the extent of the deficiency: whereas the decree of Sir W. Grant in the present case, assumes the right of the plaintiffs to pass by the assets of the surviving debtors, and go at once for their whole demand against the estate of the deceased partner, without any previous investigation or accounts, and without its being shown that the plaintiffs have been unable to obtain payment of any part of it out of the joint estate. That certainly cannot be right; and Lord Eldon intimated as much when the appeal was before him, although he was not able, before he quitted office, to make up his mind as to the proper mode in which the decree should be remodelled. The defendants, putting their case at the lowest, are at all events entitled to an inquiry into the state of the assets of the five partners at the time of Mr. Devaynes' death.

Mr. *Knight*, in reply.

THE LORD CHANCELLOR:—This case has been very fully argued. I shall not enter at length into the matters [\*505] which it involves, or do \*more now than advert to one or two points, as to the doctrine of courts of equity, and as to the equity upon which the cases on this subject rest.

There may have been considerable doubts in the minds of Lord Thurlow and Lord Eldon, touching the origin of this equity; and, perhaps it would not be going too far to say, that taking what has been said by those learned Lords, the one in *Hoare v. Contencin*,<sup>(a)</sup> and the other in *Ex parte Kendall*,<sup>(b)</sup> a suspicion may arise that if they had been sitting here originally, when the earliest of the cases was decided, they might not have laid the foundation of the rule that has since prevailed. That is certainly possible. But it is perfectly clear that they themselves admit the existence of the doctrine; and that one of them

(a) 1 Bro. C. C. 27.

(b) 17 Ves. 514.

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at least, Lord Eldon, has acted upon it; for it was justly observed by the very learned judge before whom this case first came, and who gave great attention to it, upon a full review of all the cases, and with a distinct reference to what Lord Eldon had previously said in *Ex parte Kendall*, that although Lord Eldon, in *Ex parte Kendall*, expressed some surprise at the introduction of this equity, yet he did not intimate a doubt of its existence, and that he had indeed acted upon it in *Gray v. Christwell*.(a) To which Sir William Grant might have added, that even in the case of *Ex parte Kendall* itself, where his Lordship is supposed to have doubted the propriety of the rule, and where he certainly expresses his ignorance as to its origin, he nevertheless fully recognized it. That Lord Hardwicke fully recognized the doctrine, and took that distinction between mercantile transactions and other contracts, which was afterwards \*referred to and adopted by Sir W. Grant, appears [\*506] clear from the case of *Bishop v. Church*.(b)

It is not upon slight grounds, certainly, that any court, either of law or equity, ought to loosen and unsettle that which has stood for so long a period as nineteen years. If it be true that even a prevailing error—what has been called a common or universal error—may be said to make the law, this at least may be allowed to be a sound foundation of the doctrine I am referring to, namely, that, unless a great and manifest deviation from principle shall have been committed, it may create much further mischief to reverse an individual case by way of correcting a slight error, if that error has been acted upon for a long series of years, than to leave it as it stands; more especially, if the opinion of lawyers and the decisions of judges have been ruled by it, and if, upon the analogies of that case, the same principle has been recognized and adopted in other cases connected with and relating to it.

Now in this case I should feel myself under the pressure of these considerations; but I am relieved from all doubt, when I

(a) 9 Ves. 118.

(b) 2 Ves. sen. 371.



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find that the same principle, which was acted upon by Lord Eldon, has been already pursued and followed up in a case not now called in question. For *Sumner v. Powell*(a) was as nearly as possible the principal case, or rather it was a decision the other way, upon circumstances the converse of the present. In that case there was an obligation constituted by covenant, and it was held that the whole liability arose out of that covenant, and was to be extended no further. That being a case, then, the converse of the present, it may be referred to as [\*507] touching upon the principle here. \*Besides, the Master of the Rolls there distinctly recognized the doctrine now sought to be impeached, and he expressly referred to this case of *Devaynes v. Noble*, in a way to show that when it was before him, it had not been lightly dealt with by his Honor, but had been decided upon mature deliberation, and after a full examination of all the authorities.

Decree affirmed.(b)

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 MARTIN v. MARTIN.—BELL v. MARTIN.

1831: 11th March.

After the marriage of a female ward a settlement is made, under the direction of the court, for the benefit of the wife and children of the marriage, of a moiety of a plantation in Demerara, of which the wife was seised in fee at the time of the marriage; the husband and wife afterwards mortgage the estate to persons having full notice of the settlement; by the law of Demerara the settlement was a nullity, and in no manner affected the rights and powers of the husband and wife over the estate: Held, that the mortgage is valid, inasmuch as the equity of the wife and children attaches only upon the person of the husband, and not upon the estate.

THE plaintiff, Maria Elizabeth Alleyne Martin, was entitled to considerable personal estate, and to the fee simple of a moiety of a plantation in the colony of Demerara, called New Orange Nassau, and also, in the event of her attaining twenty-one, and

(a) 2 Mer. 30.

(a) See *Wilkinson v. Henderson*, 1 Mylne & Keen, 582.

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of her brother dying under that age, to the fee simple of the other moiety of the same plantation. She and her brother being both infants, a suit in their names, for the protection of their persons and fortunes, was instituted by their next friend in the Court of Chancery in England, against all proper parties: pending that suit, the female plaintiff, before she or her \*brother attained the age of twenty-one years, inter- [\*508] married, without the consent of the court, with the defendant, Anthony Crosbie Martin: and an order was made in the cause, referring it to Mr. Popham, then one of the Masters of the Court, to approve of a proper settlement of her real and personal estate upon her and her children. In pursuance of that order an indenture of settlement, dated the 27th day of August, 1802, and made between Anthony Crosbie Martin and his wife of the one part, and John Longden and David Milne of the other part, was approved by the Master, and duly executed. By this settlement Anthony Crosbie Martin, in consideration of the marriage, bargained, sold and assigned unto John Longden and David Milne, their executors, administrators and assigns, all those the personal estate and effects therein described of Maria Elizabeth Alleyne Martin, and all right, title, claim and demand, both at law and in equity, of him, Anthony Crosbie Martin, of, in, to, and out of the same and every part thereof, to hold and enjoy the same unto and by John Longden and David Milne, their executors, administrators and assigns, as and for their own proder moneys and property; nevertheless upon trust, after raising a certain sum for the purposes therein mentioned, to lay out and invest the thereby assigned trust premises in government or real securities as therein mentioned; and upon further trust, that John Longden and David Milne and the survivor of them and the executors and administrators of such survivor, should, from time to time, during the joint lives of Anthony Crosbie Martin and the plaintiff his wife, pay the interest, dividends and annual produce of the trust moneys, stocks, funds and securities, and every part thereof, as the same should from time to time become due and payable, unto such person or persons, and for such intents and purposes

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[\*509] \*as the wife, notwithstanding her marriage should, by any note or writing signed by her, direct or appoint; but so as not to deprive her of the intended use or benefit thereof, by sale or mortgage or otherwise in the way of anticipation; and, in default of such direction or appointment, that they should from time to time pay the same into her proper hands, for her sole and separate use, notwithstanding the marriage, free from the debts, intermeddling, contracts or engagements of Anthony Crosbie Martin; and her receipts were to be sufficient releases and discharges for such dividends, interest and annual produce: and in case she should happen to survive her husband, and there should be one or more child or children of Anthony C. Martin on the body of Maria Elizabeth Alleyne his wife, then, from and immediately after the decease of Anthony C. Martin, as to one moiety of the said trust moneys, stocks, funds and securities, upon trust that they John Longden and David Milne, or the survivors of them, or the executors or administrators of such survivor, should assign, transfer, or pay the same unto Maria Elizabeth Alleyne Martin for her absolute use and benefit; and after declaring, as to the other moiety, certain trusts for the benefit of the issue of the marriage, it was by the indenture further agreed, that, in case there should be no child of the marriage who should live, being a son, to attain the age of twenty-one years, or, being a daughter, to attain that age or be married, then John Longden and David Milne should, from and after the decease of Anthony C. Martin and such failure of children, pay, assign and transfer the last-mentioned moiety or half part of the trust moneys and premises thereby assigned, and the stocks, funds and securities upon which the same should be laid out or invested, or so much thereof as should not have been

[\*510] applied by way of advancement as therein \*mentioned, unto Maria Elizabeth Alleyne Martin for her absolute use and benefit: And it was thereby also agreed and declared, that in case Anthony C. Martin should happen to survive his wife, and there should be one or more child or children of the marriage, then, as to one moiety of the said trust moneys and premises, the same should be held upon trust to pay the dividends,

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interest and annual produce thereof unto Anthony C. Martin or his assigns during the term of his natural life; and as to the other moiety, from and after such decease of the wife, in the lifetime of her husband, and also as to the first mentioned moiety, of which the interest, dividends and annual produce were so directed to be paid to the husband for his life, from and after the decease of him Anthony C. Martin, certain trusts were declared, for the benefit of the children of the marriage, and Anthony C. Martin, in manner therein mentioned; but if there should be no child of the marriage who should live, being a son, to attain the age of twenty-one years, or, being a daughter, to attain that age or be married, then the trustees were in case Anthony C. Martin should survive his wife, to permit and suffer him and his assigns to receive and take the dividends, interest and annual produce of the whole of the trust moneys to his and their own use and benefit during his natural life; and from and immediately after his decease, to pay, assign and transfer the same, or so much thereof as should not have been applied by way of advancement, in pursuance of the powers therein contained, unto such person, and for such intents and purposes, and in such parts, shares and proportions, manners and form as Maria Elizabeth Alleyne Martin, by her last will and testament, &c., to be signed, published and attested as therein mentioned, should direct or appoint; and in default of such direction or appointment, unto such person or persons as, at the time of \*the death of Maria [\*511] Elizabeth Alleyne Martin, would have been entitled to her personal estate, in case she had died without having been married and intestate: and Anthony C. Martin did for himself, his heirs, executors and administrators, and for his wife, covenant with John Longden and David Milne, their heirs, executors and administrators, and she Maria Elizabeth Alleyne Martin, so far as in her lay, and she could and lawfully might, did consent and agree, that in case she should live to attain the age of twenty-one years, or such other age, as according to the laws of the colony of Demerara, should render her competent to concur in the settlement, he Anthony C. Martin and she Maria Elizabeth Alleyne Martin, and all other persons claiming, or to claim, by,

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from, under or in trust for them or either of them, would, immediately upon her attaining the age of twenty-one years or such other age as aforesaid, or as soon after as might be, at the costs and charges of Anthony C. Martin, by such conveyances and assurances in the law as John Longden and David Milne, &c., should in that behalf direct and reasonably require, convey and assure, unto John Longden and David Milne, their heirs, executors and administrators, as well all that undivided moiety of them Anthony C. Martin and Maria his wife or one of them in her right, as also the other moiety to which she, or Anthony C. Martin in her right, was entitled in reversion or remainder, expectant upon the decease of her brother under the age of twenty-one years, of and in the plantation called New Orange Nassau, with the boiling houses, still houses, and other out houses and buildings thereunto belonging, situate and being in the colony of Demerara, with the plantation utensils and implements, slaves, cattle, and all other estate real and personal thereunto belonging, situate, lying and being in the said colony, with the appurtenances, to hold the same unto and to the use of them John Longden and \*David Milne, their heirs, executors, administrators and assigns, according to the tenure, nature and quality of the same premises respectively, upon the trusts, and under and subject to the same powers, provisos, declarations and agreements as were thereinbefore expressed and contained of and concerning the before-mentioned trust moneys, and the stocks, funds and securities on which the same should be invested, or as near and conformably to the said trusts, powers, provisos, declarations and agreements as the deaths of the persons and the nature of the several properties would permit: and, in order that the respective estates thereby settled and covenanted to be settled might go in the same course of succession, it was agreed and declared that the plantation, hereditaments and premises, should, for the purposes of the settlement, be considered as personal estate; and that in the meantime, and until such conveyance, assurance, or settlement should be executed as aforesaid, the rents, issues, and produce of the premises so to be conveyed, settled and assured, should go and be paid to and received by the same

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persons, and in the same manner, as if such conveyance and assurance had been actually made.

Maria Elizabeth Alleyne Martin, some time after, attained the age of twenty-one years ; and by indentures of lease and release, bearing date the 21st and 22d days of January, 1806, indorsed on the indenture of settlement, and made between Anthony C. Martin and Maria his wife of the one part, and John Longden and David Milne of the other part—reciting that Maria E. A. Martin had then lately attained the age of twenty-one years, and that therefore Anthony C. Martin and his wife were desirous, in pursuance of their covenant contained in the indenture, to make and execute such conveyance and assurance of their undivided moiety of the \*plantation and hereditaments, to [\*513] which the plaintiff or her husband in her right became absolutely entitled on her attaining the age of twenty-one years, upon the trusts in and by the settlement expressed,—Anthony C. Martin and Maria his wife granted, bargained, sold, aliened, assigned, transferred, and set over unto John Longden and David Milne, and to the heirs and assigns, all that one undivided moiety of them, Anthony C. Martin and Maria his wife, or one of them in her right, of and in the plantation or parcel of land and hereditaments commonly called New Orange Nassau, with all houses and out houses and buildings thereunto annexed, with the plantation utensils and implements, slaves and cattle, and the offspring and progeny thereof respectively, and all the appurtenances whatever to the said hereditaments and premises belonging, and of and in all other the hereditaments and premises in and by the indenture of settlement covenanted and agreed to be conveyed and assigned respectively, to hold such part or parts of the same plantation, hereditaments and premises as were of the nature of real estate with the appurtenances, unto and to the use of John Longden and David Milne, their heirs and assigns, and to hold such part and parts of the said premises as were of the nature of personal estates or chattel interests, and every part thereof, unto the said John Longden and David Milne, their executors, administrators and assigns, according to the nature and quality

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thereof, nevertheless, upon and for the several trusts, and subject to the provisos, declarations and agreements in and by the indenture of the 27th of August, 1802, expressed and declared of and concerning the same, or such or so many of them as were then subsisting undetermined and capable of taking effect.

These several indentures were duly recorded in the proper office in the colony of Demerara,

[\*514]     \*The brother of Mrs. Martin attained twenty-one and afterwards died, leaving a daughter Jane L'Espinasse his only child. David Milne was his executor and the guardian of his child.

In the year 1807, or soon afterwards, the plantation and estates became indebted to various persons for stores and supplies; and it was deemed necessary to raise a sum of money for the use and benefit of the estate, and to meet the wants of Mr. and Mrs. Martin, and of Jane L'Espinasse. Mr. John Wilson, who resided in Demerara, had been for some time receiver and manager of the plantation; and in order to procure funds to enable him to carry on the concern, he drew a bill of exchange, for a sum of 1,522*l.* 15*s.* 2*d.*, on Mr. Gladstone a merchant of Liverpool. He at the same time sent to Mr. Gladstone a letter explaining the reason why and the purpose for which the bill was drawn; and in it he gave an account of the pecuniary state of the plantation, and proposed that Mr. Gladstone should become consignee of the plantation in England. Anthony C. Martin also sent a letter to David Milne, dated the 21st day of January, 1808, inclosing a copy of Wilson's letter to Mr. Gladstone. The intention was that Mr. Gladstone should become the consignee in England of the plantation, and should in that character advance the amount of the bill and such other sums as might be necessary for the purposes of the concern. Upon the arrival of the letters of Mr. Wilson and Mr. Martin in England, some correspondence on the subject took place between Mr. Gladstone and David Milne, and Mr. Gladstone paid a sum of

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808*l.* 17*s.* 3*d.* in part of the bill; but they did not finally come to any agreement as to the terms upon which Mr. Gladstone should accept the bill of exchange, and act as the consignee of the plantation in England; and Mr. Gladstone had no further transaction connected with the plantation. In the hope of obtaining better terms than \*were required by Mr. [\*515] Gladstone, David Milne applied to the house of Reed and Bell in London, with whom he had some connection in business: and it was ultimately agreed between Mr. Milne and the firm of Reed and Bell that they should make the necessary advances for the estate, and receive the consignments as proposed in Mr. Wilson's letter; that, there being a sum of 808*l.* 17*s.* 3*d.* due to Mr. Gladstone in respect of his advances, Messrs. Reed and Bell should pay him that sum; and that a mortgage should be executed to them of the plantation and property in Demerara to secure to them the advances they might make in respect of it. In pursuance of this arrangement, Messrs. Reed and Bell advanced money and accepted bills; and an indenture of mortgage was prepared for execution, bearing date the 31st of March, 1809, and made between Anthony C. Martin and Maria his wife of the first part, John Longden and David Milne of the second part, and James Bell of the third part, which James Bell together with Charles Reed were then the partners of the house of Reed and Bell, whereby, after reciting that Anthony C. Martin and Maria his wife, and also David Milne as such executor and guardian as aforesaid, had applied to and requested James Bell to advance and lend the sum of 1,000*l.*, and that, in order to secure the repayment thereof with interest, after the rate of 6 per cent., and also any further sum of money which James Bell might advance for Anthony C. Martin and his wife, and also for David Milne as such guardian, and any or either of them, not exceeding the sum of 3,000*l.*, and interest at the rate aforesaid on such further sum or sums of money from the time or respective times of advancing the same, they Anthony C. Martin and Maria his wife, and also John Longden and David Milne, had proposed and agreed to assign the entirety of the plantation, hereditaments, and premises to James Bell, his execu-



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[\*516] tors, administrators and \*assigns by way of mortgage, it was witnessed, that in consideration of the said sum of 1,000*l.* paid to Anthony C. Martin and Maria his wife, and to David Milne as such guardian as aforesaid, in trust for Jane L'Espinasse, and for the other considerations therein mentioned, John Longden and David Milne, at the request and by the direction and appointment of Anthony C. Martin and Maria his wife, did grant, bargain, sell, demise, assign, transfer, and set over, and Anthony C. Martin and Maria his wife did direct, limit, and appoint, grant, bargain, sell, demise, assign, and set over, ratify, and confirm, and also David Milne, as such executor or guardian as aforesaid, did grant, bargain, sell, and demise, assign, transfer, and set over unto James Bell, his executors, administrators, and assigns, all that the entirety of the plantation or parcel of land commonly called or known by the name of New Orange Nassau, with the boiling house, curing house, still houses, and other out houses and buildings thereunto belonging, situate, lying and being in the colony of Demerara, together with the plantation, utensils, and implements, slaves and cattle, and the offspring and progeny thereof respectively, to hold unto James Bell, his executors, administrators and assigns for the term of 1,000 years thence ensuing, subject to a proviso for redemption on payment of the sum of 1,000*l.* and interest, in manner therein mentioned, together with such further sum or sums of money, not exceeding the sum of 8,000*l.*, which James Bell should advance for Anthony C. Martin and the plaintiff, and also David Milne, in their respective capacities, with interest at the rate aforesaid.

This indenture was executed by Anthony C. Martin and Maria his wife, and by David Milne, and was duly enrolled and registered at Demerara, according to the law prevailing in that colony.

[\*517] \*The advances made by the house of Reed and Bell on account of the plantation and its owners having greatly exceeded the amount of their mortgage, Messrs. Reed and Bell requested from David Milne and Anthony C. Martin

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and Maria his wife a further security; and accordingly a deed-pole of further charge and mortgage, bearing date the 14th of September, 1812, was indorsed on the last-mentioned indenture of mortgage. This deed-poll was made in the names of Anthony C. Martin and Maria his wife, and John Longden and David Milne, and thereby, after reciting that, since the date and execution of the indenture of the 31st of March, 1809, James Bell had lent and advanced to Anthony C. Martin and Maria his wife, and to David Milne as such executor and guardian as aforesaid, the further sum of 3,000*l.*, and that Anthony C. Martin and his wife and David Milne had requested James Bell to advance and lend a further sum to the extent of 9,000*l.*, exclusive of the sum then due to him, which he had consented to do upon having the same with interest secured to him by a further charge or mortgage upon the plantation, it was declared that, in consideration of the further advance to be made by James Bell, they, Anthony C. Martin and Maria his wife, and John Longden and David Milne, did subject and charge the plantation with the repayment, not only of the sum of 3,000*l.* and interest, but also of all such further sums as the said James Bell had then already advanced, or should thereafter advance, with interest, after the rate of 6 per cent., not exceeding the sum of 9,000*l.* exclusive of the sum of 3,000*l.*; and Anthony C. Martin and Maria his wife, and John Longden and David Milne, covenanted that the plantation and hereditaments should stand charged as well with the sum of 3,000*l.* and interest, as with such other sum as James Bell should advance as aforesaid.

\*David Milne executed this deed-poll for himself, and, [\*518] by power of attorney authorizing him so to do, for the other parties to it; and it was duly enrolled and registered in the colony of Demerara. The name of James Bell, it was admitted, was made use of in these transactions as a trustee on behalf of himself and of Charles Reed as copartners.

The sums of money advanced by Messrs. Reed and Bell on account of the plantation and the owners of it, subsequently to

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1812, having greatly increased in amount, it became necessary that a further security should be executed to them; and accordingly a power of attorney, bearing date the 1st of March, 1815, was executed by Anthony C. Martin and his wife to John Wilson, Esq., of Demerara, thereby authorizing him to appear before the commissioners of the court of civil and criminal justice of Demerara, and in the names of them Anthony C. Martin and Maria, his wife, as the lawful proprietors of an undivided moiety of the plantation named New Orange Nassau, to declare them, Anthony C. Martin and Maria his wife, to be truly and justly indebted unto James Bell of London, merchant, a partner in the mercantile house or firm of Reed, Bell & Co., his order, heirs, or assigns, in the sum of 8,612*l.* 19*s.* 5*d.*; and to promise to repay the sum of 8,612*l.* 19*s.* 5*d.* to James Bell, his order, heirs, or assigns, free and without charges, in three equal annual instalments, at the times therein mentioned, with interest; and for the better security thereof, to put the said J. Bell in possession of the one undivided moiety of the plantation called New Orange Nassau, with all negroes thereupon belonging to the same, buildings and further dependencies, to be taken by both the respective parties, according to the inventory thereof, until the debt of 8,612*l.* 19*s.* 5*d.*, with the interest due thereon, should have been paid off and settled; with power to James [\*519] Bell to \*administer alone the undivided half of the plantation, or to cause it to be administered by his agents, and to ship and consign the produce already in hand and further to be gathered to such persons or houses of trade in London, and, in case of the surrender of the colony to Holland, in Amsterdam, as James Bell should think proper. The instrument contained various other clauses in order to make the security effectual, according to the law of the colony.

A similar power of attorney was executed to John Wilson by David Milne and John Longden; and the name of the defendant, James Bell, was used in both these documents in trust for himself and his partners.

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By virtue of these powers John Wilson appeared as the attorney of Anthony C. Martin and his wife, and of J. Longden and David Milne as trustees, before the court of criminal and civil justice at Demerara, and, in the forms required by the Dutch law, passed a mortgage of a moiety of the plantation, dated the 1st of September, 1815, in the terms and upon the conditions contained in the letters of attorney. Shortly afterwards, what was called a sentence of willing condemnation was obtained against the plantation, whereby the house of Reed, Bell & Co. became entitled to sell the plantation, and to apply the money arising from the sale in liquidation of their debt.

At a subsequent period Bell and Grant became the successors in business of Reed and Bell, and the debt and the securities were vested in the new firm.

A settlement of accounts having taken place, an agreement was entered into, bearing date the 27th day of April, 1820, and made between Bell and Grant as \*copartners [\*520] of the one part, and Anthony C. Martin and his wife of the other part, whereby—after reciting that Anthony C. Martin was indebted to the defendants as partners and successors in trade of the house of Reed, Bell & Co., in a considerable sum of money secured to them by several mortgages upon certain estates of Anthony C. Martin, in Ireland, and upon the moiety of a plantation called New Orange Nassau, in Demerara, which last-mentioned mortgage was taken in the name of James Bell, as a partner in the house of Reed, Bell & Co., on behalf of the firm; and that disputes had for some time existed between Anthony C. Martin and Bell and Grant, their predecessors or partners, respecting the balance claimed by them to be due from Anthony C. Martin, amounting, on the 31st of December, 1819, to the sum of 10,381*l.* 1*s.* 8*d.*, from which sum Anthony C. Martin claimed certain allowances in respect of an alleged possession of the mortgaged estates by the house of Reed, Bell & Co.; and in order to put an end to these disputes, the parties thereto had agreed to the terms and conditions therein mentioned—it was

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witnessed that, for the considerations therein mentioned, Anthony C. Martin and the plaintiff, his wife, and the defendants did thereby severally and respectively covenant with the other and others of them, that the amount then due from Anthony C. Martin upon the several mortgages should be agreed at the sum of 9,000*l.*, as a final balance, such balance to be binding and conclusive on both parties; that Anthony C. Martin should relinquish all title and claim to allowances and deductions, and Bell and Grant agree to limit and reduce their demand to that sum; that Anthony C. Martin should, within nine months, pay the sum of 9,000*l.*, or the greater or less sum as the case might be, which should then be due, with interest; that, in the meantime, Bell and Grant should retain the mortgage securities and all the title deeds relating thereto, and all remedies [\*521] \*thereon, except only so far as such remedies might be suspended or varied by the agreement; that they should be at liberty, immediately on the execution of the agreement, and should be authorized by Anthony C. Martin and his wife and all proper parties, by an instrument to be executed at the same time with the agreement, to take such proceedings on or by virtue of the mortgage of the moiety of the plantation and estate called New Orange Nassau as by the law of Demerara might be necessary, to ratify and confirm the mortgage thereon for the sum of 9,000*l.*, or the greater or less sum actually due, as the case might be, and interest, as the counsel for the defendants should advise, and as fully and effectually in every respect as if all the forms used in Demerara for such a purpose were therein inserted; that if Anthony C. Martin should not within the time prescribed pay the principal and interest, Bell and Grant should be at liberty, and they were thereby authorized, to foreclose the mortgage of the plantation, and to enter thereon and make sale thereof, and the stocks, slaves and effects thereon, or to take such other proceedings relative to the mortgage and estate as they should think fit, without being compelled to have recourse in the first instance to the mortgages on the estates in Ireland; it being the intent and meaning of all the parties that the mortgage on the plantation in Demerara should be deemed and considered

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as the first security to the defendants, and to be resorted to by them in the first instance: and it was further agreed that although Anthony C. Martin should not within the time limited pay the sum of 9,000*l.*, yet the sum of 9,000*l.* should be taken as the agreed debt between the parties upon the old account, and neither party should be at liberty to open the same, and revive any of the claims or disputes existing between them, touching the amount of the debt or the debts claimed thereupon, previously thereto; that Anthony C. Martin and his \*wife and all other necessary parties, should, at the re- [\*522] quest of the defendants, make and execute all such further deeds, instruments, and assignments, as might be necessary and proper to carry that agreement into full effect; and that in case of such default as aforesaid, the several mortgages so held by or in trust for Bell and Grant should, notwithstanding that agreement, be in full force and effect for the sum of 9,000*l.*, or the greater or less sum actually due, as the case might be, and interest at 6 per cent. per annum.

In order to carry this agreement into effect, a power of attorney, bearing date the same 27th of April, 1820, was executed by Anthony C. Martin and his wife, George Milne, the son of David Milne, James Christian Clement Bell, described as the heir at law and administrator of James Bell, and Robert Grant his partner, by which, after reciting the articles of agreement, the parties constituted Frederick Cost of Demerara their attorney, and authorised him to appear in the court of civil and criminal justice in the colony of Demerara, and to acknowledge and declare that he Anthony C. Martin was justly indebted unto Bell and Grant, upon and by virtue of the mortgage of the 5th of September, 1815, in the sum of 9,000*l.* sterling; and to confirm to them the full possession of the moiety of the plantation, negroes, and stock granted by John Longden and David Milne. Frederick Cost, in pursuance of this power, and in the forms required by the Dutch laws, duly passed the mortgage, and took all necessary steps for carrying the articles of agreement into effect. The time stipulated for the payment of the sum of 9,000*l.*

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expired on the 29th of June, 1821; and the money was not paid.

The sums of money secured by the mortgages were advanced by Reed and Bell and their successors in business, partly [\*523] for the purpose of satisfying and \*discharging the debts due from the moiety of the plantation belonging to Anthony C. Martin and the plaintiff his wife, or one of them; partly, at the request and entreaty of Mrs. Martin, for the subsistence of herself, her husband and children, to provide them with comforts, and to preserve them from wanting the common necessities of life; and partly for the purpose of supplying stores for the use of the plantation, and in their character of consignees to the plantation.

In 1820, a suit was instituted in the Court of Chancery, in the name of the infant Jane L'Espinasse, by her next friend, to which Reed and Bell, together with A. C. Martin and his wife, and George Milne, were defendants. By a decree in that suit, bearing date the 25th day of March, 1820, it was referred to the Master to inquire whether the estate of the infant had been or was liable in respect of any, and if any, of which of the several sums secured by the mortgage and further charge bearing date the 31st of March, 1809, and the 5th of September, 1815. The Master made his report in that cause on the 20th of February, 1821; and by it he allowed the defendants Reed and Bell such sums as were properly chargeable against the infant's moiety.

The present bill was filed by Mrs. Martin for the purpose of having it declared that the several mortgages and charges were fraudulent and void, as against the articles of agreement of the 27th day of August, 1802, and the settlement of the 21st and 22d days of January, 1806.

A cross bill was filed by James Christian Clement Bell and Robert Grant, the present partners in the firm of Bell and Grant, for the purpose of establishing the mortgages and charges.

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\*By the decree made at the original hearing of these [\*524] causes, bearing date the 15th of December, 1829, it was referred to the Master to inquire whether, by the law of Demerara, the legal estate in the plaintiff M. E. A. Martin's moiety of the plantation and premises in the pleadings mentioned, passed to the trustees of the deeds of lease and release, bearing date respectively the 21st and 22d days of January, 1806; and also to inquire whether by the law of Demerara, and, in case where there was no ante-nuptial contract, any contract binding the wife's real property could, after marriage, be made between the husband and wife, or between the husband and other persons as trustees for the benefit of the wife and children; and also to inquire whether, after a valid settlement made, by the law of Demerara, for the separate benefit of the wife, with remainder to the children, the husband could in any and what manner, and under what circumstances, renounce the benefit of such settlement in favor of any and what creditors; and also to inquire in whom the legal estate in the moiety of the plantations in question was, by the law of Demerara, then vested, and by what means; and whether, by the law of Demerara, there was a lien upon the estate for moneys advanced for the support of a wife and her children, or for stores, supplies and necessaries for the estate, and whether it made any difference in that respect that the estate was originally the estate of the wife, and was settled for the separate benefit of the wife, with remainder to the children: and the Master was to be at liberty to state any special matters at the request of the parties.

In pursuance of this decree the Master made his report, and thereby found that, according to the Dutch law, which prevails in the colony of Demerara, upon a marriage without any ante-nuptial contract, a \*community of the real and [\*525] personal estate of the husband and wife takes place; that the Dutch law does not permit or acknowledge, as valid, any kind of settlement made prior to the marriage; that the intervention of trustees, in such a deed, is a proceeding entirely unknown, and would make no difference, but would be considered



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merely as *in fraudem legis*; that the right of the husband and wife, during the coverture, must remain in the same state as they were fixed at the period of their union, that is to say, that a community of property and goods then immediately takes place between them; that neither the husband nor wife, either alone or together, can make any alteration whatever in that state of property by any settlement in favor of themselves or their issue; that no such settlement would be valid or binding; that, according to the said law, a real estate cannot be passed by deed only, but it is necessary that the transfer thereof should be passed and executed before the magistrates and the justices of the place where the property is situated; that the legal estate in the moiety of the plaintiff Maria Elizabeth Alleyne Martin of the plantations and premises in the pleadings mentioned, did not pass to the trustees by the deeds of lease and release, bearing date respectively the 21st and 22d of January 1806; that, by the law of Demerara, and in a case where there was no ante-nuptial contract, no contracts binding the wife's real property can be made, after marriage, between the husband and the wife, or between the husband and other parties as trustees for the benefit of the wife and children; that the inquiry whether, after a valid settlement for the separate benefit of the wife, with remainder to the children, the husband can renounce the benefit of it in favor of creditors, proceeded upon an assumption wholly unknown to the Dutch law; that, by such law, the only settlement which is [\*526] permitted is termed \*an ante-nuptial contract, the sole effect of which is to exclude community in respect of the property the subject of such settlement; that there is no mode of settling the property upon the children of the marriage by means of an ante-nuptial contract; that an ante-nuptial contract cannot be varied by the husband and wife in favor of each other, but the wife with the consent of the husband, or the husband with the consent of the wife, can mortgage or charge the settled property, or property excepted from the community, in favor of creditors or third persons, either for the purpose of paying off the debts of the husband, or of satisfying judgments to which the property was previously liable, or of purchasing, providing or

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paying for stores and necessities supplied to plantations and estates situate in the colonies, and particularly in the colony of Demerara, and generally for the payment and satisfaction of any debts validly contracted; that as the Dutch law forbids women to become sureties, it is necessary, when a settlement has been made previous to marriage, and the wife is desirous of subjecting her separate property to the private debts of her husband, that she should, in the deed itself, expressly renounce the benefit of such law, without which the deed would not be valid and effective as to such property, but it is incumbent on the wife to prove that such charge or incumbrance was created on account or in respect of the private debts of the husband; and when the consideration is for necessities supplied for the support and maintenance of the wife and family, or for the supply of stores and provisions for the separate estate of the wife, it would not come within the rule. The Master further found, that, upon the marriage of the plaintiff without any ante-nuptial contract, a community of the moiety of the plantation ensued, and thereupon Anthony C. Martin, assisted by his wife, or even alone, as the legal disposer of the property in community, was enabled, in favor of \*creditors or third persons, to vary [\*527] and alter the state of the property, by any deed or act, for a valuable consideration; that such deeds or acts, are valid and binding; that the effect of the community of goods is to form a common stock of the whole property, both movable and immovable, possessed by the husband and wife at the time of their marriage, or acquired subsequently, which common stock is liable to all debts and engagements of either party existing at the time of or contracted during the marriage by the husband, or by the wife with his concurrence; that Anthony C. Martin and the plaintiff having become indebted to the defendant's predecessors in trade, in considerable sums of money, the mortgage of the 1st of September 1815, passed under the authority of the powers of attorney executed by Anthony C. Martin and the plaintiff his wife, and by John Longden and David Milne, was duly passed, in conformity with the law and practice of the colony, for the purpose of securing such sums of money; that the legal estate in

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the moiety of the plantation in question, by the law of Demerara, vested in the said James Bell, upon the 1st of September, 1815, by means of the mortgage, and that thus the legal estate was then vested in the defendant James Christian Clement Bell as the heir at law of James Bell. The Master further found, that by the law of Demerara there is a lien upon the estate for moneys advanced for the support of a wife and her children, and for stores, supplies and necessaries furnished for the estate; and that it made no difference, in this respect, that the estate was originally the estate of the wife, and had been excluded from community by means of an ante-nuptial contract.

The two causes now came on to be heard on further directions on the Master's report.

[\*528] \*Mr. *Tinney* and Mr. *Garratt*, for the plaintiff.

Mr. *Bickersteth*, Mr. *Pemberton* and Mr. *R. Roupell*, for the defendants.

On the part of the plaintiff, it was contended that the validity of the incumbrances was to be tried by the law of England. The parties were resident here when the marriage took place and the settlement was made: the trusts of that settlement bound the property in the hands not only of the husband and wife, but of all who acquired interests in it with notice of the equitable rights to which it was subject. It was of no importance that Bell had got the legal estate; for the advances were made with full notice of the settlement, and the defendants could not be permitted to use the legal estate to defeat the equitable interests of which they had notice before they advanced their money. The settlement contained an express provision that the plantation should be considered as personalty; and if a suit had been instituted to have the trusts of the settlement carried into effect, the court would have directed the plantation to be sold. The plaintiff had a right to that relief; and when the property was converted into money, the proceeds would be dealt with only according to the trusts of

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the settlement. The laws of Demerara might determine in whom the legal estate was; but the law of England would not permit a party resident in London, who advanced his money with full knowledge of the settlement, to make use of that legal estate to annihilate the rights of the wife and children.

On the other hand, the defendants insisted that to argue on the supposition that the plantation was bound by the trusts of the settlement, was to beg the whole question. The rights of the different persons in the \*plantation must [\*529] be governed by the law of the colony; and as by that law the settlement was inoperative, the trusts which it purported to create were a mere nullity, so far as the property in Demerara was concerned.

THE MASTER OF THE ROLLS:—It has been contended for the plaintiff, that although no interest actually passed to the wife and children by the marriage settlement, yet the court might have compelled a sale of the wife's moiety of the plantation, and a settlement of the money produced by the sale upon the wife and children: that therefore the wife had an equity affecting the estate; and that the defendants, having full notice of the settlement, were bound by it equally with the husband, and could not by their act defeat the wife's equity. But it was admitted that no authority could be found directly applicable to the case.

The point raised by the plaintiff does not appear to be of much importance to her interests; because if that point could be sustained, it seems by the Master's report that the considerations for the defendants' securities would by the law of Demerara give them a lien upon the moiety of the plantation against the plaintiff and her children, to the amount now claimed by the mortgagees.

I incline to think that if this moiety of the plantation were unincumbered, and a bill were filed by the wife for the sale of it, and for the investment of the money produced by the sale upon

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the trusts of the settlement, the court might give the relief thus prayed, upon the ground that it would effectuate the actual purpose of the court in directing the settlement. But the settlement as executed does, by the law of Demerara, in no manner [\*580] affect the right and power of \*the husband and wife over the estate, and leaves them with the same absolute ownership that they would have had, if there had been no settlement. The equity of the wife appears to me therefore not to be attached to the estate, but to the person of the husband, by reason of his contracts, and to give the wife a right only to claim an equivalent.

It is true that if the estate had not been incumbered, the proper equivalent would have been the sale of the estate, and the investment of the money upon the trusts of the settlement; and upon a suit for that purpose the equity of the wife would attach upon the estate; but not unto such bill filed, because another equivalent might have been provided by the court. To illustrate this distinction, let it be supposed that the husband in this case had been the apparent owner of two estates of equal value, and had, under the direction of the court, made a settlement of the estate A., and the trustees of the settlement had afterwards been evicted of this estate by the defect of the husband's title. There can be no doubt that if the husband remained the owner of the estate B., upon a bill filed by the wife, the court would compel a settlement of the estate to the former uses, and the wife would then have an equitable interest in the estate B. But until such bill filed, the husband would remain the absolute owner of the estate B., and could effectually sell or charge it, although the purchaser had full notice of the prior settlement of the estate A. and the eviction of the trustees from that estate, because the equity of the wife was personal to the husband, and did not attach upon the estate B. My opinion, therefore, in this case is, that here the equity of the wife attached only to the person of the husband, and not upon the estate, and that the defendants the mortgagees, although having full notice, are not affected by that equity.

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Irvin v. Ironmonger.

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\*IRVIN v. IRONMONGER.

[\*581]

ROLLS.—1831: 19th and 22d March.

Where freehold, copyhold and leasehold estates are devised, subject to a general charge for the payment of debts; and the freeholds and leaseholds are subject to mortgages, and there is a descended freehold estate purchased after the will, the general personal estate not specifically bequeathed is first to be applied in payment of simple contract debts as far as it will extend, and the surplus of simple contract debts is to fall proportionally on the freehold, copyhold and leasehold estates devised: then the specialty debts, including all mortgage debts, are to be satisfied out of the descended freehold estate as far as it will extend: and the surplus of such specialty debts is also to fall proportionally upon the freehold, copyhold and leasehold estates devised.

*Semble*, furniture specifically bequeathed, ought to contribute to the payment of the debts proportionally with the devised real estates.

Where a testator gives an annuity to A. for life, payable quarterly, the first payment to be made within eighteen months after his death, the annuity does not commence till fifteen months from the death of the testator.

Where a testator gives an annuity to A. for life, and directs the first payment to be made within one month from his, the testator's death, the annuity commences from the death of the testator; and though the first year's payment is to be made at the appointed time, the payment for the second year does not become due till the end of the year.

THE suit was instituted for the purpose of carrying into effect the will of Richard Ironmonger, the material parts of which were in the following words:

"I, Richard Ironmonger, &c., do make and publish these instructions as and for my last will and testament, until a more formal will shall be drawn and executed by me. I hereby direct all my debts, funeral and testamentary charges and expenses, to be fully paid and satisfied; and I direct that the wages of my servants living with me at my decease shall be paid, and that my executors shall pay to each of such servants one year's wages: and I hereby give, devise, and bequeath unto Thomas James Mawe, of &c., Stephen Cutley, of &c., and Barrett Taylor, of &c., and their heirs and assigns, all and every the freehold, copyhold and leasehold estates and premises, with their and

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every of their respective rights, members and appurtenances whatsoever, and wheresoever situate, and of any kind and description whatever, and all and singular the personal estate, stocks, funds, and securities, and all other my property whatsoever and wheresoever, which I shall die seised or possessed of or \*entitled unto, upon trust, to pay to my dear wife, Ann Ironmonger, the sum of 300*l.* per annum, for and during the term of her natural life, the first year's annuity to be paid within one month after my death; and I direct that my said beloved wife shall have the use of all my furniture, plate, linen, books, china, glass, &c., &c., during her life; but that in the event of her wishing to remove her residence to a distant country, I then direct that every accommodation be given as to the before-mentioned furniture, &c.; but that it will be advisable to consult with the after-mentioned executors of this my will, as to the best mode of granting the required accommodation without injury to the property or lessening its value in the estimation and calculation of the parties hereafter interested in the same; my executors to have an inventory of the property which my said wife is to have the use of as aforesaid: and I give, devise, and bequeath to the said Barrett Taylor an annuity of 300*l.* per annum to be paid quarterly, so long as she shall continue a single woman, &c.; but the said Barrett Taylor not to be allowed to assign or dispose of or anticipate the said annuity; the first payment of the said annuity to be made within three calendar months after my death: and I give and devise to my sister Sarah Slack, wife of John Slack, of Manchester, an annuity of 60*l.* per annum, payable quarterly, during her life, free from the debts, control or interference of her husband, and her receipt to be a good discharge to my trustees; and the said Sarah Slack not to be allowed to assign or dispose of or anticipate the said annuity; the first quarterly payment to be made within eighteen calendar months after my death: I give to my sister Dorothea Thompson and Frederick Thompson her husband, and the survivor of them, an annuity of 100*l.* payable quarterly, but the said annuity not to be assigned, disposed of, or anticipated; the first quarterly payment to be made within eighteen

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\*calendar months after my death." After various other [\*533] bequests, the testator proceeded to dispose of the residue as follows: "And as to all the rest, residue and remainder of my estates, property (the George and Blue Boar, Holborn, in the county of Middlesex; the Union Coffee House, in Cockspur street; two houses in Richmond, in Surrey; one at Epsom, in Surrey; one at Worthing, in Sussex; three houses in North street, Brighton; one in Ship street, Brighton; one by the Market, Brighton; one house in Howe Road, Brighton), and effects, and such of the before-mentioned property as may become lapsed and fall in, I give and bequeath such rest, residue and remainder to my natural daughter Jane Taylor, having assumed the name of Jane Irvin, &c., and to her heirs; and to be assigned and paid over to her on her attaining the age of twenty-five years, or marrying with the consent of her guardians before she shall have attained the age of twenty-one years, for and during the term of her natural life; and upon and after her death, I do direct that the estates and property which I shall die possessed of, and in which she shall have a life interest from the moment of my death, shall be limited to the heirs of her body in strict settlement, with cross remainders over; and in the event of the said Jane Taylor, otherwise Jane Irvin, marrying before she shall have attained the age of twenty-one years, and without such consent, then the said Jane Taylor, otherwise Jane Irvin, shall only be entitled to an annuity of 300*l.* during her natural life, and the estates shall be limited to the heirs of her body as before directed; and the trustees to be at liberty to apply such parts of the rents and profits of such estates, for the maintenance and education of the heir at law of her body lawfully begotten, &c: and in the event of the said Jane Taylor, otherwise Jane Irvin, dying unmarried, or without issue, then I do direct that the said Barrett Taylor shall be paid a further annuity \*of 200*l.*, subject to the same conditions and [\*534] restrictions as before directed, respecting the annuity of 300*l.*: and if the said Jane Taylor, otherwise Jane Irvin, shall marry with consent as aforesaid, and die without leaving issue of her body, then I do direct that the husband of



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such marriage shall have and be entitled to the rents and profits of the said estate, subject to the said annuities, for and during the term of his natural life; and from and after the death of the said Jane Taylor, otherwise Jane Irvin, without issue as aforesaid, and after the death of such husband, I give and devise all that my freehold estate, situate and being in Holborn, in the said county of Middlesex, unto my nephew, John Slack, for and during the term of his natural life; and from and after his decease I give and devise the same estate unto the heirs of his body, lawfully begotten, in strict settlement, with cross remainders over, subject to the payment by him of the sum of 200*l.* to each of his sisters, when they have attained the age of twenty-one years; and if the said John Slack shall die without issue of his body, lawfully begotten, then I give and bequeath the same estate in Holborn unto Sarah Powlett Shawe, for and during the term of her natural life; and from and after her death to the heir of her body lawfully begotten, in strict settlement, with cross remainders over; and from and after the death of Jane Taylor, otherwise Jane Irvin, without issue, as aforesaid, and after the death of such husband, I give and devise all those my estates and property at Brighton and Worthing in the county of Sussex, and Epsom and Richmond in the county of Surrey, unto the said Sarah Powlett Shawe, for and during the term of her natural life, subject to the payment by her of the sum of 200*l.* to each of the daughters of the said John Slack and Sarah his wife,

when they have attained the age of twenty-one years;  
[\*535] and from and after the decease of the said \*Sarah

Powlett Shawe I give and devise the same estate to her heirs, in strict settlement; and if the said Sarah Powlett Shawe shall die without leaving issue lawfully begotten, then I give and devise the same estates and premises unto my said nephew, John Slack, for and during the term of his natural life, and from and after his death to his heirs of his body, lawfully begotten, in strict settlement, with cross remainders over; and from and after the death of Jane Taylor, otherwise Jane Irvin, and after the death of such husband as aforesaid, I give and devise all that my leasehold estate and premises, called the

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Union Coffee House in Cockspur street in the county of Middlesex, held under the Crown, unto Thomas Kettlewell, the younger, of Clapham, in the county of Surrey, for and during the term of his natural life; and after his decease, to the eldest son or daughter of his marriage, living at his death; and if he shall die without issue, I give and devise the said leasehold estate and premises unto the said Sarah Powlett Shawe, for and during her life; and after her death I give and devise the said leasehold estates and premises unto her eldest son or daughter; and if the said Sarah Powlett Shawe should die without such issue, then I give and devise the same leasehold estate to my said nephew, John Slack, for and during the term of his natural life; and after his death I give the same to his eldest daughter: and provided the said Jane Taylor, otherwise Jane Irvin, Sarah Powlett Shawe, and my said nephew, John Slack, and Thomas Kettlewell, the younger of Clapham, shall respectively die without issue lawfully begotten, then I give and devise and bequeath all the hereinbefore mentioned property and effects, to my friend, Benjamin Taylor, Esq., of Calcutta, in the East Indies, for and during the term of his natural life; and from and after his death I give and devise the same property and effects unto the Rev. John Toplis for and during the term of his natural life; and from and after his death, I give and devise the same property and effects unto the heirs of his body lawfully begotten in strict settlement, with \*cross remainders over; and from and [\*536] after the death of the said Benjamin Taylor without issue as aforesaid, I give and devise the same property and effects unto the heirs of his body lawfully begotten, in strict settlement, with cross remainders over; and from and after the death of the said Reverend John Toplis, without issue as aforesaid, I give and devise the same property and effects unto James Toplis the elder for and during the term of his natural life; and from and after his death, I give and devise the same property and effects unto the heirs of his body lawfully begotten, in strict settlement, with cross remainders over." He appointed his wife, Ann Ironmonger, his executrix, and Thomas Kettlewell, James Lawson, and Thomas James Mawe, his executors.

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The bill was filed for the administration of the trusts of the will; and at the original hearing, a decree was made directing accounts and inquiries.

It appeared by the Master's report, that at the time of making his will, and at his death, the testator was seised of freehold estates which were subject to mortgages, and of certain copyhold estates which were unincumbered, and was possessed of certain leasehold property which was in mortgage; that he also died seised of an unincumbered freehold estate, which he had purchased between the making of his will and his death; that he was indebted at his death by simple contract in a sum of 2,032*l.* 9*s.* 1*d.*, which exceeded the amount of his general personal estate, excluding the furniture given to the widow for life and the leasehold estate; and that he had no specialty debts other than those secured by mortgage.

[\*537]      \*The cause now came on to be heard upon further directions.

Mr. *Pemberton* and Mr. *Wright*, for the plaintiff.

Mr. *Tinney*, for some of the defendants.

Mr. *O. Anderdon*, for other defendants.

A question was made as to the annuity of 300*l.* given to the widow; it being contended on her part, that as the annuity commenced from the death of the testator, and the first payment was to be made at the end of one month from his death, all the future payments should in like manner be made in advance.

THE MASTER OF THE ROLLS ruled that the annuity was to commence from the death of the testator, and the first year's annuity was to be paid in advance to her at the end of one month after the testator's death; but that the language of the will did not warrant him to direct that the annuity, which might be due in future years, should in like manner be paid in advance.

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A question was also made, as to the annuity of 60*l.* given to Sarah Slack, and the annuity of 100*l.* given to the testator's sister Dorothea Thompson and her husband.

It was submitted on the part of the annuitants that though the first payment was postponed, the annuities commenced from the time of the testator's death.

THE MASTER OF THE ROLLS ruled that, the annuities being payable quarterly, and the first payment being directed to be made within eighteen calendar months after the testator's death, the annuities did not \*commence till fifteen [\*538] months after the death of the testator.

The material questions were, in what order the different portions of the assets were to be applied in payment of the testator's debts, and whether the mortgaged estates were to pass *cum onere*.

*Oneal v. Mead*,<sup>(a)</sup> was cited to show that each mortgaged estate must, in the hands of the persons to whom it was devised, bear its own burden. But it was answered that that case was different from the present, because here all the estates which were in mortgage formed a part of a general mass of property which the testator had charged with his debts; and it was argued that after the general personal assets were exhausted, the different component parts of the mass, which the testator had charged with his debts, ought to contribute, in proportion to their respective values, to the discharge of the mortgage debts as well as of the other debts.

THE MASTER OF THE ROLLS:—The will begins with a direction that the testator's debts, funeral and testamentary charges and expenses shall be fully paid and satisfied: and this amounts to a charge of those debts and expenses upon the real estate, in aid of the personal estate. It then gives all the testator's freehold,

(a) 1 P. Wms. 693.

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copyhold and leasehold estates, and all his personal estate (except his furniture, which he gives to his widow for life) to trustees in trust for the payment of certain annuities and legacies, and subject thereto, in trust for the testator's natural daughter  
 [\*539] \*for life, with remainder to her children in manner therein stated; but, in certain events, the testator gives over his freehold, copyhold, leasehold and personal estates to several different persons.

The personal estate not specifically bequeathed is, therefore, in the first place, to be applied in payment of the simple contract debts, as far as it will extend; and the surplus of those debts, not satisfied by such personal estate, is by reason of the charge in the beginning of the will to fall proportionally on the freehold, copyhold and leasehold estates, and on the furniture given to the widow for her life. The apportionment is rendered necessary by reason of the gift over of the property to different persons in the events specified. The descended freehold estate will, in the first place, be applicable to the discharge of the mortgage or specialty debts, and the surplus of such mortgage debts will also fall proportionally upon the freehold, copyhold and leasehold estates devised by the will, and upon the furniture so given to the widow. For the purpose of ascertaining the amount of the proportion of simple contract debts, and of the specialty debts which will be to be borne respectively by each of the freehold, copyhold and leasehold estates, and furniture, &c., it will be necessary that the Master should ascertain the value of each separate property, and should also ascertain the amount of the simple contract and specialty debts, which, according to the foregoing declaration, will fall upon each estate and upon the furniture. But inasmuch as it is only in uncertain events that these several properties will pass to different persons, it may not be useful at present to direct that the sums thus chargeable upon each separate property, for payment of debts, should be raised by sale or mortgage; and when  
 the cause comes on again for further directions, some  
 [\*540] provisional arrangement \*may perhaps be made for payment of the debts from one estate, without prejudice to

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the rights of the parties entitled over to each particular property, if the events which give them that title should arrive. The value of the furniture, subject to the widow's interest in it, will be a part of the general personal estate.

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"His Honor doth declare that the legacies and annuities given by the will of the testator are charged on the freehold, copyhold and leasehold estates, which the testator was seised or possessed of at the date of his will: and his Honor doth declare that the first year's annuity given to Ann Ironmonger, the testator's widow, is to be computed from the testator's death, and payable in advance from the end of one calendar month from the testator's death, and the second year's annuity payable at the end of the second year from the testator's death, &c.: and his Honor doth declare that the annuity given by the will to the defendant Barrett Taylor, commenced from the time of the testator's death, and ought to be paid quarterly; and that the annuity given by the testator to his sister, Sarah Slack, should commence from the end of fifteen calendar months from the death of the testator; and that the annuity of the testator's sister Dorothea Thompson and her husband, should commence from the end of fifteen calendar months from the death of the testator." The decree then directed the freehold estate, which was conveyed to the testator after the date of his will, to be sold, and the money arising from the sale to be paid into court; the accounts of the personal estate to be continued, and the sum due in respect of the personal estate to be paid into court: "And his Honor doth declare, that if the amount of the sums hereinbefore directed to be paid into court shall be insufficient to pay \*the amount of what [\*541] may be found due for the costs of the parties, the sum of 2,032*l.* 9*s.* 1*d.*, being the amount of the simple contract debts due from the testator, and the legacies and subsequent interest thereon, the devisees in trust are to be at liberty to raise the amount of such deficiency by a mortgage upon the freehold, copyhold and leasehold hereditaments and premises, which the testator was seised or possessed of at the date of his will, such mort-

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gage to be without prejudice to the rights of any of the parties interested under the testator's will: and his Honor doth declare that the freehold, copyhold and leasehold estates which the testator died seised or possessed of, are proportionally liable for the amount of the mortgage debts due from the testator, as also for the amount hereinbefore directed to be raised for payment of the costs, debts, legacies and interest."

Reg. Lib. 1830. A. fol. 1839.

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### BARTON v. TATTERSALL.

Rolls.—1831: 28th February, 18th March.

Under the Insolvent Debtor's Acts the insolvent is discharged with respect to debts due from him only to the extent of the sums stated by him in his schedule.

PHILIP JACOBS deceased, had twice obtained his discharge under the Acts for the Relief of Insolvent Debtors, the first time in 1814, and again in 1820; but no dividend was paid under either insolvency to any creditor. Jacobs afterwards became possessed of considerable property, and died on the 8th of July, 1827, having appointed the defendant his executor. The plaintiff was a creditor under both insolvencies, and also assignee under them: and he instituted this suit on behalf of himself and the other creditors of Jacobs for the administration of his estate.

[\*542]     \*The assets were sufficient to leave a considerable surplus, after payment of all his debts incurred subsequently to his second discharge under the Insolvent Act.

By the decree,<sup>(a)</sup> made on the hearing of the cause by the Master of the Rolls, his Honor declared, that the surplus assets of the estate of Philip Jacobs, after the payment of his funeral expenses and debts incurred since the last insolvency, were ap-

(a) 1 Russ. & Myrie, 237.

plicable, first, to the payment of his debts under the second insolvency, and then in payment of his debts under the first insolvency; and after directing the usual accounts of the personal estate, and of debts, and funeral and testamentary expenses and legacies, it was ordered that it should be referred to the Master to take an account of the debts due to the plaintiff and the other creditors of the testator, under his insolvencies, according to the schedules thereof, and the Master was to cause advertisements to be published in the usual manner; and it was further ordered that the testator's personal estate not specifically bequeathed should be applied in payment of his debts and funeral expenses, in a due course of administration, and then in payment of his legacies.

In the schedule of creditors, filed by Jacobs under his first insolvency, Sir Thomas Clarges was included: the sum due to him was stated to be 108*l*. In fact, its true amount was 238*l*. 5*s*.; and Sir Thomas had claimed to prove that amount before the Master. But the Master, considering that he was bound by the decree not to admit a proof for more than the amount specified in the insolvent's schedule, had allowed Sir Thomas' claim only to the extent of 108*l*. There were other creditors in a similar situation.

\*Sir Thomas Clarges now presented a petition in order to obtain a direction that the Master should allow to him and the other creditors of the insolvent, such sums as they might be able to prove were due to them, although larger than the amount of their respective debts as stated in the insolvent's schedule. [\*548]

Mr. Tinney commented on the provisions of the 53 G. 3, c. 102, particularly on the 10th and 19th sections, and referred to *Baker v. Sydee*,(a) and *Taylor v. Buchanan*.(b)

(a) 7 Taunt. 170.

(b) 4 Barn. & Cress. 419.



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Barton v. Tattersall.

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*March 18th.*—THE MASTER OF THE ROLLS:—This is a petition by Sir Thomas Clarges, stating himself to have been a creditor of Jacobs' at the time of his first insolvency, for the sum of 238*l.* 5*s.*, although in the schedule then delivered by the insolvent, he was represented as a creditor for the sum of 108*l.* only; and stating further, that the Master, to whom the cause was referred, had refused to admit him as a creditor under the decree for a larger sum than 108*l.*, and praying that the Master might be directed to allow to him and the other creditors under the insolvencies, such sums, larger than the amounts stated in the schedules, as they might be able to establish.

The Master, being directed by the decree to take an account of the debts due to the creditors of the testator under the insolvencies, according to the schedules thereof, the petitioner, whatever might be the opinion of the court with respect to his claim under the insolvencies, could not regularly obtain [\*544] the object of his petition as \*the decree now stands; the Master being concluded, as to such debts, by the amounts stated in the schedule. I am of opinion, however, that the decree, as to that point, is properly framed. The case of *Baker v. Sydee*,<sup>(a)</sup> decides that, under the Insolvent Acts which were in force at the time of the transactions in question, the insolvent was discharged only in respect of debts due to creditors named in the schedule; and the reasoning upon which that judgment proceeds, appears to me to lead to the conclusion that, as to creditors named in the schedule, he was discharged only to the extent of the sums stated in the schedule to be the amount of the debts. In the subsequent case of *Taylor v. Buchanan*,<sup>(b)</sup> it is expressly ruled that the discharge of the insolvent prevails only to the extent of the debt specified in the schedule; and it does not appear to me, that the Acts of the 1 G. 4, c. 119, and of the 3 G. 4, c. 123, which passed in the interval between the two cases, make any difference in this respect.

(a) 7 Taunt. 179.

(b) 4 Barn. & Cress. 419.

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Hanrott v. Cadwallader.

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If, therefore, the petitioner is able to establish any demand against the testator's estate, it must be as a general creditor, and not under the insolvencies.

Let the petitioner go before the Master, to make such claim in that character as he may be advised; and reserve the costs of this petition, until the Master has made his report upon that claim.

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\*HANROTT v. CADWALLADER.

[\*545]

ROLLS.—1831: 18th March.

The bill of the husband and wife, where it seeks relief in favor of the husband to the prejudice of the wife's interest, is considered by the court as the bill of the husband alone.

In such a case the proper course is to make the wife a defendant.

If there were no deed, and it was simply the case of a wife consenting that the husband should receive money which was given to her, then the wife's consent in court would be sufficient, without altering the form of the pleadings.

IN this case a bill was filed by the husband and wife and their trustee, to give effect to a deed by which the wife, who had become entitled to a certain sum of money to her separate use, had assigned it to the trustee upon trust, as to a large part of it, for her husband. The deed was executed after a separation had taken place between the husband and wife. It was stated in the bill, but was not proved. The cause was now heard as a consent cause.

The circumstances being stated, the Master of the Rolls declined to make a decree on the pleadings as they stood; observing that this was not a case in which proof of the deed could be dispensed with,<sup>(a)</sup> or in which the court could act upon the mere allegation of the bill.

(a) *Ryan v. Anderson*, 3 Mad. 174.

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*Read v. Backhouse.*

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His Honor added that it was a misapprehension of the principles of the court to suppose, that, because the wife was joined as a coplaintiff, the court would act against her interest for the benefit of the husband, without proof of the instrument under which the plaintiff claimed; that the court considered that the bill of the husband and wife was the bill of the husband alone; and that in this case the proper course would be to make the wife a defendant in order that it might appear upon her answer, that she admitted the deed to have been fairly obtained, [\*546] and that she had, at the time of \*executing it, full knowledge of her rights in the property assigned. If there were no deed to be established in this case, and it was simply the case of a wife consenting that the husband should receive her money, then the wife's consent in court would be sufficient without altering the form of the pleadings.

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**READ v. BACKHOUSE.**

**ROLLS.**—1831: 22d March.

Where a testator makes a codicil without professional assistance, his expressions are not to be construed literally and technically, if upon the whole instrument it appears that he meant to use them in a different sense.

A testator by his will devised all his real estates to trustees, upon trust for his son during his life, with remainder to the son's children in strict settlement, and, for default of such issue, to the testator's brother for life, remainder to Robert in tail; and he gave the residue of his personal estate to the same trustees, on trust, subject to two annuities, for the children of his son, and failing them, for his brother for life, and after his death, for Robert absolutely. The brother died; and the testator afterwards made a codicil, by which, after reciting that in case his son should die without an heir male or female, he had bequeathed his estates in the parish of Missenden and elsewhere to Robert, he revoked that part of his will, and excluded Robert from all chance of benefit under the will, and in the place of Robert, he, if his son should die without heirs male or female, bequeathed all the estates he had or might have at the time of his death in Missenden or elsewhere, which by virtue of his will were the sole property of his son, to Thomas and the heirs of his body, subject to the same conditions of entail as were imposed on the son; and in case Thomas died without heirs, he bequeathed all the estates which Thomas would inherit by the death of the testator's son, to Jacob and his heirs,

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Read v. Backhouse.

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subject to the payment of the testator's debts and annuities: Held, that the gift of the residue of the personal estate to Robert was revoked, and that this residue was not undisposed of, but was given to Thomas.

THE testator, Thomas Backhouse, made his will, dated the 21st of May, 1788; and thereby "as to all his estate whatsoever, he gave and devised all and every the messuages, lands, tenements, tithes, rents, and hereditaments whatsoever, as well freehold as copyhold, whereof or wherein he, or any other person or persons in trust for him, had or was entitled to any estate of freehold or inheritance in possession, reversion, or remainder, or expectancy, unto his friends John Read and James Bouchier, and their heirs, to the uses, upon the trusts, and for the \*intents and purposes, and with and subject to the [\*547] powers, provisos, and declarations thereafter limited, declared, and expressed, of or concerning the same; that is to say, as to, for and concerning his two small tenements, situate to the south end of his messuage in the town of Great Missenden, then in the several occupations of Thomas Moore and Solomon Buckley, and likewise the orchard adjoining, containing by admeasurement one acre, to the use of Dorothy Hill, second daughter of Richard Hill, late of Wrexham, in the county of Denbigh, Esq., deceased, and her assigns, for and during her life; and as to, for and concerning the said two tenements and orchards, from and immediately after the decease of Dorothy Hill, and as to, for and concerning all other the messuages, lands, tenements, tithes, rents, and hereditaments and premises thereinbefore devised, from and immediately after his own decease, to the use of his natural and beloved son Thomas Joseph Backhouse, who was born on the 27th of January, 1764, in the city of Manilla, upon the island of Luconia, and then was a lieutenant in his Majesty's service, and his assigns, for and during the term of his natural life, without impeachment of waste;" and, from and after the death of his son, he limited the estate in strict settlement to the first and other sons or the body of his son, with remainder to the daughters of his son as tenants in common, and, in default of such issue, to the use of his brother Jacob Backhouse and his assigns, for and during his life, without impeach-



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ment of waste; and from and immediately after the decease of Jacob Backhouse, to the use of his nephew Robert Backhouse, second son of Jacob Backhouse, and the heirs of his body issuing, and for default of such issue, to the right heirs of his brother Jacob Backhouse for ever. The will contained the usual powers of leasing and jointuring. The testator then gave "all his household goods, furniture, pier and other glasses, [\*548] linen, \*pictures, prints, plate, china, and books, which should be in or about his house at Great Missenden or any of the offices thereunto belonging, at the time of his decease, to the person or persons who for the time being should be entitled to his said house, to the end and intent that the said household goods and furniture, pier and other glasses, linen, pictures, prints, plate, china, and books might go therewith as heir-looms, and be used and enjoyed with his house so long as the rules of law or equity would permit." And, after giving certain legacies, "as to all the residue of his personal estate whatsoever, not thereinbefore specifically devised, which should remain after payment of his debts and funeral expenses, and the several specific and pecuniary legacies or sums of money thereinbefore given, and such legacies as he should at any time or times thereafter give by any codicil or codicils to the will, he gave and bequeathed the same and every part thereof unto John Read and James Bouchier, their executors, administrators, and assigns, upon trust, that they and the survivor, his executors, administrators, and assigns, should from time to time lay out and invest or continue such residue of his personal estate and effects in the public stock or funds, or on government or real securities at interest; all which stocks, funds, or securities might be from time to time sold, assigned, transferred, altered, and varied, and the money thereby arising or coming to their or his hands again laid out, or invested, in or upon such new or other stocks, funds or securities, when and so often as they or he should think fit:" And he directed, "that John Read and James Bouchier and the survivor of them, their executors, administrators, and assigns should stand and be possessed of and interested in, the said residue of his personal estate and effects, and the stocks, funds

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and securities, wherein or upon which the same, or any part or parts thereof, should be laid out and invested or \*continued, upon the trust and to the intent and purpose that John Read and James Bouchier and the survivor, his executors, administrators or assigns, should, out of all the dividends or interest or annual produce of the same stocks, funds and securities," pay two annuities, one to Dorothy Hill, and the other to Maria Arnold: "And as to, for and concerning all the said stocks, funds and securities, wherein or upon which the residue of his personal estate should be laid out or invested or continued, subject nevertheless to the said yearly payment so thereby directed to be made thereout to the said Dorothy Hill and Maria Arnold respectively, during their lives, he directed that the said John Read and James Bouchier and the survivor of them, his executors, administrators and assigns, should stand and be possessed of and interested in the said stocks, funds and securities, upon trust, in case there should be any child or children of his said son Thomas Joseph Backhouse, living at the time of his son's decease, or born within due time afterwards, to transfer the same stocks, funds and securities, unto and amongst all and every such his child and children, equally, share and share alike; and to be transferred or transferable in manner and at the time therein specified, that is to say, to sons at twenty-one and to daughters at twenty-one or marriage, which should first happen; and in case there should not be any child or children of Thomas Joseph Backhouse living at the time of his decease or born in due time afterwards, or, being such, all of them, being a son or sons, should die before he or they should attain his or their ages of twenty-one years without having been married, then in trust that they the said trustees and the survivor of them, his executors, administrators and assigns, should stand possessed of and interested in the whole of the residue of his personal estate and effects, and of the funds and securities wherein or \*upon which the same, or any part or parts thereof, [\*549] should be laid out or invested or continued as aforesaid, or so much thereof as should not have been sooner advanced and applied as aforesaid, upon trust to pay, apply and dispose of all

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the dividends and interest or annual produce of the same stocks, funds and securities, which should remain after payment of the said yearly payments so thereinbefore directed to be made there-out unto Dorothy Hill and Maria Arnold respectively, during their respective lives as aforesaid, unto and for the use and benefit of his brother Jacob Backhouse and his assigns, for and during his natural life; and from and immediately after his decease, then upon trust to transfer, assign and pay the whole of the stocks, funds and securities unto his nephew Robert Backhouse, to and for his own absolute use and benefit; provided always, that it should be lawful for the said John Read and James Bouchier and the survivor of them, his executors, administrators and assigns, in case he or they should so think fit, at any time during the life of his said son, Thomas Joseph Backhouse, to lay out any part of the said residue of his personal estate in the purchase of a company in any of his Majesty's regiments, for the benefit and promotion of his son, anything thereinbefore contained to the contrary thereof in any wise notwithstanding."

Jacob Backhouse, the brother, having died, the testator afterwards made the following codicil: "This is a codicil of me Thomas Backhouse, wrote with my own hand and sealed with my arms; and it is my will and desire that this my codicil shall have full force and power, as all other good and lawful instruments made by the strictest forms of law, bearing date this 10th day of November, 1796." After giving directions as to the disposal of his remains after his decease, the codicil [\*551] \*proceeded as follows: "Whereas in my last will and testament, I have ordered and willed that, in case my son Thomas Joseph Backhouse (now a major in his Majesty's 47th regiment) should happen to die without an heir male or female, that, in such case, I have bequeathed my estates in the parish of Great Missenden and elsewhere to my nephew Robert Backhouse, this part of my last will and testament I revoke, annul and set aside, and I exclude him, the said Robert Backhouse my nephew and his heirs, from any chance of benefit from my last will and testament, made by Thomas Goostrey, Esq., attor-

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ney at law ; and in the place of the said Robert Backhouse my nephew, if my said son Thomas Joseph Backhouse unfortunately shall happen to die without heirs male or female, in such case I give and bequeath all the estates that I now have, or may have at the time of my decease, in the parish of Great Missenden in the county of Bucks, or elsewhere, which by virtue of my last will and testament were the sole property of my dear son Thomas Joseph Backhouse, to Thomas Backhouse, son to my nephew Jacob Backhouse, an infant, now living with his father at Wigton, in the county of Cumberland, and to the heirs of his body lawfully begotten, for ever; subject, nevertheless, to all and every condition which are stated and enforced by my said last will and testament upon my son Thomas Joseph Backhouse with regard to entail, and every other clause which my said son was bound to fulfil and observe by virtue of my last will and testament; and in case my said relation Thomas Backhouse, now an infant, shall happen to die without heirs, in such case I give and bequeath all my estates, which he inherited by the death of my said son, to my nephew Mr. Jacob Backhouse and his heirs for ever; subject, nevertheless, to the payment of all just debts and annuities which are not revoked in this my codicil."

\*The testator's son, Thomas Joseph Backhouse, died [\*552] without children.

The question in the cause related to the disposition of the residuary personal estate.

Thomas Backhouse and Jacob Backhouse contended that the codicil revoked the gift of the residue to Robert, and had given it to Thomas, and, in the event of his death without children, to Jacob. The next of kin agreed with these parties in saying that the gift to Robert was completely revoked; but they alleged that there was no valid disposition of the residue to any other person, and that it went, therefore, according to the Statute of Distributions. The representatives of Robert insisted that the revocation was confined to the devise of the real estate to Robert, and did not extend to the residue of the personalty.



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Mr. *Bickersteth* and Mr. *Rogers*, for Thomas Backhouse.

The testator by his will, in the event of his son dying without leaving children, had given both his real and his personal estate to his nephew Robert. The language of the codicil is an express revocation of both gifts. When the testator tells us that he excludes Robert from any chance of benefit from his last will, he necessarily excludes him from the residue of the personalty. He proceeds; "and in the place of the said Robert Backhouse, my nephew, if my son Thomas Joseph Backhouse unfortunately shall happen to die without heirs male or female, in such case I give and bequeath all the estates that I now have or may have at the time of my decease, in the parish of Great Missenden, in the county of Bucks, or elsewhere, which by virtue of my last will and testament were the sole property of my dear son [\*553] Thomas Joseph Backhouse, to Thomas \*Backhouse, son to my nephew Jacob Backhouse." The introductory words of the clause manifest an intention to substitute Thomas for Robert; and there being in the mind of the testator a clear purpose not merely of revocation but also of substitution, the substitution must be held to extend to the whole subject of the gift, if the words will fairly bear that construction. It is true that the testator has described the subject, which he gives to Thomas, as "all the estates that I now have or may have at the time of my decease in the parish of Great Missenden or elsewhere." But such words may either be confined to real estate or extend to personalty according to the general tenor of the codicil; *Doe v. Tofield*; (a) and, from the mode in which similar words are used in the clause revoking the gift to Robert, it is manifest that the testator considered them as comprehending all that was included in that gift. Besides, the subject, which by the concluding clause of substitution is given to Jacob, clearly includes the personalty; for it includes the fund out of which the debts and annuities were to be paid: and it is identical with the fund, which, by the previous substitution,

(a) 11 East, 246.

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was given to Thomas. The codicil, therefore, though incorrect in its language, contains a sufficient expression of the testator's intention that, in the events which have happened, Thomas should take the residue of the personal estate.

Mr. *Tinney* and Mr. *Parry* followed the same line of argument.

Mr. *Pemberton* and Mr. *West*, for the representatives of Robert Backhouse.

The revocation of the gift to Robert is said to be for the purpose of substituting Thomas: the extent of the revocation, \*therefore, will be best determined by ascertaining how much is given to Thomas. The words of the gift to Thomas are such as in themselves are properly applicable only to real estate. They expressly describe what is given to him as being that which, under the will, would be the sole property of the testator's son; and there is an express direction that the gift to Thomas should be subject to the same conditions of entail as had been imposed on the son. Now under the will the son took only the real estate; in the personalty, he had not even a life interest given him; after his death it was limited to his children. It is, therefore, impossible to contend that Thomas is substituted as the residuary legatee of the personal estate; and the revocation of the gift to Robert ought not to extend beyond what is given to Thomas in his stead. At all events, if Robert does not retain the personalty, it must go, not to Thomas, but to the next of kin.

Mr. *Matthews* and Mr. *Hayter*, for the next of kin.

THE MASTER OF THE ROLLS:—The question in this cause is, whether, by the effect of the codicil, the testator's great nephew Thomas Backhouse is substituted in the place of the nephew Robert Backhouse mentioned in the will to the residuary personal estate, as well as to the real estates thereby devised.

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The codicil is obviously written by the testator himself, and is not to be construed literally and technically. The testator, after reciting that by his will he had given his estates in Missenden and elsewhere to his nephew Robert Backhouse, in case his son should die without issue, revokes that part of his will, and excludes his said nephew from any chance of benefit from [\*555] his will. \*He had, in fact, given to his said nephew, in the event stated, no other estate than that of Missenden; but he had also in that event given to him his residuary personal estate; and when he proceeds in plain terms to exclude his said nephew from any chance of benefit under his will, the inference is irresistible, that he means to exclude him from the residuary personal estate, and that he uses the term "elsewhere," however inaccurately, to express that intention. After having thus excluded the nephew Robert from every chance of benefit under his will, in the place of his said nephew, he gives and bequeaths all the estates which he has or may have at his death, at Missenden or elsewhere, in the event stated, to Thomas Backhouse; plainly meaning an entire substitution of Thomas for Robert, and again expressing his intention as to the personal estate by the word "elsewhere." In a subsequent part of the codicil, he declares that if Thomas should die without heirs (meaning children), he gives all his estates, which Thomas was to inherit by the death of his son, to his nephew Jacob Backhouse, subject, nevertheless, to his just debts and annuities, which are not revoked by his codicil. Now the just debts and annuities are expressly charged by the will upon the personal estate; and as he plainly means that Jacob, who is substituted for Thomas, is to take the estate which is subject to the payment of the debts and annuities, it is clear that here he uses the word "estates" as comprising both real and personal estate.

A difficulty is interposed by the direction that the nephew Thomas is to take the estates at Missenden and elsewhere, which were to become the property of Thomas Joseph Backhouse; and it is said that by the will the son takes no interest in [\*556] the residuary personal estate. \*It is true that in the

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will there is no direct gift of the personal estate to the son; but the personal estate is not by the will given over to the son's children, till after the death of the son; and the trustees are directed to apply as much as might be necessary of the personal estate in the purchase of promotion for the son in the army: and, if there is any slip in the will which would deprive the son of his personal estate, there is enough in the codicil to manifest that the testator considered that his son would take the personal estate under the will, which is all that is necessary for the present purpose.

My opinion, therefore, is, that Thomas is, by the intention of the testator, plainly substituted in the place of Robert as to all the benefits given to Robert by the will.

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\*DUNK v. FENNER.

[\*557]

ROLLS.—1831: 25th March, 18th April.

A testator by his will devises all his real estate to his executors for the purposes thereafter stated; and, after empowering them either to continue his business or to dispose of it, he gives the profits of it in the one case, and the interest of the moneys arising from the sale in the other, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives her the rents and profits of all his real estates during her life; and at her decease he devises and bequeaths to her heirs all his estates real and personal as tenants in common: if his daughter has but one child, such child is to possess the whole; but if she should die without issue, then at her decease he gives certain legacies. He next directs all his goods and effects to be sold, his said legacies to be paid, and a sum invested sufficient to purchase 150*l.* a year, which is to be paid to the husband of the daughter. He then orders his real estates to be sold at the decease of his daughter or at the decease of his brothers and sisters, according as a particular event may turn out; and he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, and the rents of them until they are sold. The daughter died without having had issue: Held, that the daughter took an estate tail in the freeholds; that the real and personal estate being given

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over together, she took the personal estate absolutely; that the annuities and legacies given at her decease were charged both on the real and personal estate, and were to be borne proportionally by the two funds.

THE testator, Thomas Funnell, made his will, dated the 8th of February, 1811, in the following words: "This is the last will and testament of me, Thomas Funnell, in the parish of Bexley, in the county of Kent, tanner. First, I nominate and appoint Joseph Fenner of, &c., James George Petre of, &c., and Dean Rayner Pike of, &c., the executors of this my will; and I also desire them to accept of 20*l.* each, as a token of my friendship, to buy mourning. It is my will that, at the decease of either of my executors, the two survivors shall choose a third to assist them, and so, in perpetual succession, a third shall be chosen by two survivors till the whole of my will is executed. My just debts, funeral expenses, incidental charges, and probate of this my will being paid, I give the sum of 100*l.* with interest commencing at my decease to my friend James Skinner, of Cranbrook in the county of Kent, and his heirs. I give and devise to my said executors, and to him or them who may be [\*558] chosen by survivors as above \*stated, all and singular my lands, houses, tenements, buildings, and appurtenances of what nature or kind soever and wheresoever, to hold the same in trust for the purposes hereinafter stated. It is my will that my business shall be continued under the inspection of my executors, while they shall judge that the property which I may die possessed of will not be diminished. I do hereby empower my executors, so long as the trade shall be carried on, to inspect the stock in trade, and all the accounts which relate thereto, whenever they shall think proper; and when they shall think there is danger of sinking money by the said trade, it is my will that they shall dispose of it to the best advantage. The profits of my said business I give to my daughter Elizabeth Jarman, for and during the term of her natural life, if the said trade should be continued so long; but if not, then the money arising from the disposal shall be invested by my executors in good and safe security, and the interest arising therefrom shall be paid half-yearly, and every half year, to my said daughter for

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the term above stated. The capital also that I may die possessed of, over and above my stock in trade, shall be also invested in good and safe security, and the interest of this surplus shall be likewise paid to my said daughter in manner and for the time above stated; and her receipt for the whole interest shall be a proper discharge for my executors for the payment of the said interest for the term of her natural life. I also give to my said daughter all the rents and profits of all and singular my real estates, whatsoever and wheresoever, for the term of her natural life; and at my said daughter's decease I give, devise and bequeath unto her heirs all and singular my estates, real and personal, to be equally divided among them; and they shall take my real estates as tenants in common, and not as joint tenants. Should my daughter have but one child, such child shall possess \*the whole; but if my daughter should [\*559] die without issue, then at her decease I give unto my brothers in law William and Henry Cheeseman 200*l.* each; and to my sister Elizabeth Dunk, and my nephews Richard, Thomas and John Dunk, and to my niece Mary, wife of John King, 100*l.* each. I also give to Daniel Jarman, my son in law, 1,000*l.* At my daughter's decease without issue, all my goods and effects of every kind shall be sold, and the said legacies paid, and a sum sufficient to produce 150*l.* a year shall be invested by my executors in good and safe security; the interest, that is to say, the said 150*l.* shall be paid to my said son in law in half-yearly payments, one moiety every half year, for and during the term of his natural life. At my daughter's decease without issue, all my real estates shall be sold to the best advantage, unless they can be let so as to produce an annual sum equal to what the money would produce at interest were my said estates disposed of, in which case they shall not be sold till the decease of my brother and sisters as hereinafter stated. All the rest and residue of my personal estate, including that which arises from my real estates, should they be sold at my daughter's decease, shall be likewise invested by my executors in good and safe security, and the interest arising therefrom shall be divided into four equal parts. Should my real estates remain unsold, then the in-

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terest arising from the said residue of my personal estate, and all the rents and profits of my real estate shall be united, and divided into four equal parts; and in either case I gave one fourth part to my brother John Funnell, another fourth part to my sister Elizabeth Dunk, another fourth part to my sister Philadelphia Kine, to be paid to them half-yearly, and every half year during the lives of my said brother and sisters; and at the decease of either of them, the said three parts shall be [\*580] equally divided and \*paid to the two survivors, in the manner above stated, till the decease of a second of my said brother and sisters, and then the said three parts shall be paid to the survivor for and during the term of his or her natural life. The remaining half moiety I give to my nephew William Body, and my nieces Sarah Crowhurst and Ann Body and their heirs, in equal shares, to be paid in like manner till the decease of my said brother and sisters. If my said son in law should die before my said brother and sister, then his annuity of 150*l*. shall be added to the said four parts, and shall be distributed exactly in the same manner; and at the decease of my said brother and sisters, my son in law being dead, the money that produced his annuity, together with the money which produced the said four parts, including the rents and profits of my real estates, shall be aggregated, and if any of my real estates remain, they shall be all sold. The aggregate sum shall then be equally divided among my nephews and nieces, the children of my brother John Funnell, and my sisters Sarah Body, Elizabeth Dunk and Philadelphia Kine; and if one or more of my said nephews and nieces should die leaving issue, such issue shall possess the share of their parents respectively. Should my son-in-law survive my said brother and sisters, then at his decease, and not before, shall the sum, which produced his annuity, be distributed among my said nephews and nieces exactly in manner above stated."

The testator died on the 11th of November, 1812. His daughter Elizabeth Jarman died in June, 1820, without having had issue, leaving her husband, Daniel Jarmin, her surviving.

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Dunk v. Fenner.

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The bill was filed for the purpose of carrying the trusts of the will into effect; and three questions were raised in the cause :

\*First. What interest Elizabeth Jarman took in the [\*561] testator's real estate.

Second. What interest she took in the personal estate.

Third. Whether the real estate was charged with the annuity of 150*l.* given to Daniel Jarman, and the legacies payable at the decease of his wife; and, if so, whether the charge on the real estate was only in aid of the personalty, so that the personal estate was the first fund for paying them, or whether the real estate and the personal estate were to bear the burden ratably.

Mr. *Bickersteth* and Mr. *Randall*, for the plaintiffs.

The daughter did not take an estate tail in the lands: she took only an estate for life, with contingent limitations to her children as tenants in common, if she left children at her decease; and if she did not leave children, then for the particular purposes expressed in the will. The gift to her is, in words, only for the term of her natural life. The devise to her heirs, which immediately follows, is a distinct gift: it is not a limitation showing the extent of the devise to her, but a new devise to them as purchasers; and the proviso, that if his daughter leaves but one child, that child shall have the whole, shows that the testator used the word heirs to denote children. It will be contended that the next words—"but if my daughter should die without issue"—denote an indefinite failure of issue, and will therefore give her an estate tail. We answer, that the context shows that they denote not an indefinite failure of issue, but merely a failure of issue at her death; for the testator immediately proceeds, "then at her decease, &c.;" and he gives various legacies which are to be *then* payable, and makes a complete disposition, which is to have effect at her decease.



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[\*562] \*Her death, therefore, is the point of time when the property is to take one course of devolution or another, according as she does or does not leave children.

There are two distinctions between *Jesson v. Wright*,<sup>(a)</sup> and the present case. First, in *Jesson v. Wright* there were no words to give an estate of inheritance to the children of the first devisee for life; and the question was, whether the first devisee should take an estate for life, with remainder to his children for life, or whether he should be held to take an estate tail, so that the lands might not go over, so long as there existed any person included in the line of issue, upon the failure of which alone the ultimate limitation was to take effect. Here the devise is "of all the testator's real estates;" so that the children of the daughter, though taking as purchasers, will take the fee. Secondly, in *Jesson v. Wright* the limitation over was only upon an indefinite failure of issue: here it is upon failure of issue at the decease of the daughter.

Were the words such as to have given the daughter an estate tail in the freeholds, the technical rules and the authorities, on which alone that construction could be tenable, are not applicable to the personal estate; and, with respect to that fund, the court will carry into effect the clear intention of the testator, giving her only a life interest in it, and applying it, from the time of her decease, in the manner directed by the will; *Forth v. Chapman*,<sup>(b)</sup> *Jacobs v. Amyatt*,<sup>(c)</sup> To give the daughter an absolute interest in the personal estate would be quite inconsistent with the discretionary power of carrying on the trade which is conferred on the trustees.

The legacies given at the death of the daughter, and the annuity of 150*l.* which her husband then takes, were  
 [\*563] \*intended to be paid out of the personal estate. After bequeathing the legacies, the testator directs as follows:

(a) 2 Bliq. 1.

(b) 1 P. Wms. 663.

(c) 4 Bro. C. C. 543.

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"All my goods and effects of any kind shall be sold, and the said legacies paid, and a sum sufficient to produce 150*l.* a year shall be invested by my executors in good and safe security; the interest, that is to say, the said 150*l.* shall be paid to my said son in law, in half-yearly payments." It is from the sale of his goods and effects that the legacies are to be discharged, and that an investment is to be made to meet the annuity. He then proceeds to direct the sale of his real estates; and he gives the residue of his personal estate, that is, the residue after payment of the legacies and the annuity (including the whole proceeds of his real estates), upon certain trusts unconnected with the legacies or annuity. The legacies and annuity, therefore, are not charged on the real estate; at all events they can be charged on it only in aid of the personalty, and in case the primary fund should be found insufficient.

Mr. *Lee*, for a defendant in the same interest, insisted on similar topics of argument. In *Trotter v. Oswald*,<sup>(a)</sup> a testator gave the residue of his property, real and personal, to trustees, in trust, "for the use of John Bogle, during his life, and to the lawful heirs of his body after his demise, but in case of his dying without issue of his body, after his decease I give all such residue to John Oswald." It was held that these words created a contingency with a double aspect, and that in the event of John Bogle leaving no child, the limitation to John Oswald would take effect. Mr. *Lee* also cited the following authorities: *Goodright v. Dunham*,<sup>(b)</sup> *Burnsall v. Davy*,<sup>(c)</sup> *Gretton v. Haward*,<sup>(d)</sup> *Doe v. Webber*,<sup>(e)</sup> *Doe v. \*Frost*,<sup>(g)</sup> *Robinson* [<sup>\*564</sup>] *v. Robinson*,<sup>(h)</sup> *Doe v. Cooper*,<sup>(i)</sup> *Doe v. Goff*,<sup>(k)</sup> *Porter v. Bradley*,<sup>(l)</sup> *Pinbury v. Elkin*,<sup>(m)</sup> *Wilkinson v. South*,<sup>(n)</sup> *Rackstraw v. Vile*.<sup>(o)</sup>

(a) 1 Cox, 317.

(b) 1 Doug. 264.

(c) 1 Bos. &amp; P. 215; 6 T. R. 30.

(d) 6 Taunt. 94.

(e) 1 Barn. &amp; Ald. 713.

(g) 3 Barn. &amp; Ald. 545.

(h) 1 Burr. 38. 2 Ves. sen. 225.

(i) 1 East, 229.

(k) 11 East, 668.

(l) 3 T. R. 143.

(m) 1 P. Wms. 563.

(n) 7 T. R. 555.

(o) 1 Sim &amp; Stu. 604.

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Mr. *Williams* and Mr. *Elderton*, for other defendants in the same interest.

Mr. *Lynch* for Daniel Jarman, who was the personal representative of his deceased wife.

The daughter took an estate tail in the freeholds. They were not to go over, unless upon a general failure of her issue; and there is no mode in which the words of this will would, in every event, have carried the whole of the freeholds throughout the whole line of her issue, except by giving her an estate tail. *Jesson v. Wright*,<sup>(a)</sup> decides that a gift to A. for life, and if he dies without issue, then over, is, in legal effect, an estate tail in A.; and that such a devise shall have its legal effect, notwithstanding inconsistent words in the context, unless it is very clear that the testator meant otherwise.<sup>(b)</sup> Here not only is it not clear that the testator meant otherwise; but the supposed intention, for the sake of which technical words are to lose their effect, is one which he cannot reasonably be supposed to have entertained. For according to the construction contended for on the other side, if the daughter had died leaving children, all of whom died in her lifetime leaving issue, the grandchildren would have taken nothing; and the property would have gone in the manner directed by the limitations over. *Doe v. Harvey*,<sup>(c)</sup> \**Doe v. Goldsmith*,<sup>(d)</sup> *Bennett v. The Earl of Tankerville*.<sup>(e)</sup> [\*565]

The realty and the personalty being included in one and the same gift, if the daughter took an estate tail in the former, she took the latter absolutely; *Donn v. Penny*.<sup>(g)</sup>

If the daughter took the personalty absolutely, it would not be very consistent with that construction to say, that she took it subject to legacies and an annuity which were not to arise until after her death. But at all events the legacies and annuity are

(a) 2 Bligh, 1.

(b) 2 Bligh, 56, 57.

(c) 4 Barn. & Cress. 610.

(d) 7 Taunt. 209.

(e) 19 Ves. 170.

(g) 19 Ves. 544.

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charged on the real estate, as well as on the personalty; *Bench v. Biles*, (a) *Cole v. Turner*; (b) and the real estate being given to the trustees for the purposes thereafter expressed, and both funds being comprised in the same gift over, the real estate must at least contribute to the burden in the proportion of its value.

Mr. *Beames*, for the trustees.

Mr. *Bickersteth*, in reply.

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*April 18th.*—THE MASTER OF THE ROLLS:—It is properly admitted that, as to the real estate, this case must be governed by the judgment of the House of Lords in *Jesson v. Wright*, unless there be found a substantial distinction between the two cases. But it is contended that there is such substantial distinction; because in *Jesson v. Wright*, if it were held that the children took \*as purchasers, they could take [\*566] for life only, and that in this case, the children, if purchasers, would take in fee, by reason that the testator here in the gift uses the expression, "all his estates real and personal," which expression, it is said, would carry a fee in his real estate. I am of opinion that, if the fee in the real estate did pass by this expression, it would not make a substantial distinction between this case and that of *Jesson v. Wright*. The gift here to heirs of the daughter is, by the limitation over, in case she should die without issue, to be read as a gift to the heirs of the body of the daughter; and the case then runs on all fours with the case of *Jesson v. Wright*, except that by the omission of the word "such" in the limitations over, a general failure of issue is here more plainly expressed.

I must say here, as was said in the judgment of *Jesson v. Wright*, that the direction, that the heirs shall take as tenants in common and not as joint tenants, manifests the intention of the

(a) 4 Madd. 187.

(b) 4 Bam. 376.

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Dunk v. Fennet.

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testator to modify the estate in a manner which the rules of law will not permit, but does not manifest an intention on the part of the testator to exclude any heirs of the body, and that the gift to one child, if there should be but one, does not narrow the general devise to the heirs of the body, because such one child being an heir of the body, the gift to such child is consistent with the general intention; and upon the whole, I adopt the expression of Lord Eldon in *Jesson v. Wright*, and declare that I think it clear that the testator intended that all the issue of his daughter should fail, before the estate should go over. I cannot impute to the testator the intention that the issue of his daughter's children should be disinherited, if their parents should happen to die in the daughter's lifetime.

With respect to the second question, I am of opinion that a different sense cannot be given to the expressions [\*567] \*of this will as applied to the personal and the real estate, because it is the plain intention of the testator in the limitations over, that the real and personal estate should go together, and the words must, therefore, receive the same construction as to both estates. The daughter, therefore, took an absolute interest in the personal estate.

As to the third question, I am of opinion that the real and personal estate are both chargeable with the annuity of 150*l.*, given to the daughter's husband. The real estate is in the first place given in trust for the purposes thereafter stated, and the gift of this annuity is one of those purposes. In a subsequent part of the will the testator directs, that, upon his daughter's death without issue, his goods and effects shall be sold, and his legacies paid, and a sum sufficient to produce 150*l.* a year invested by his executors in good and safe security for the benefit of his son in law during his life; and this direction would clearly charge the personal estate with his annuity. He then directs that his real estates shall be sold upon his daughter's death without issue, or upon the decease of the survivor of his brother and sister; and then he in effect directs that all the rest and residue

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Alexander v. Mullins.

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of his personal estate, including the produce of his real estates, shall be divided into four parts; treating the produce of the real estate as one common fund with the personal estate, and speaking of the common fund as a rest and residue after satisfying his declared purposes, and charging, therefore, the common fund for these purposes; and, among others, with the payment of the annuity.

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His Honor doth declare, that, according to the true construction of the testator's will, Elizabeth Jarman, the testator's daughter, took an estate tail in the freehold \*estates [\*568] of the testator, and that the reversion in fee of the said freehold estates passed by his said will to the defendants, John Howlett Fenner and Dean Rayner Pike, as surviving trustees of the will of the testator; and his Honor doth declare, that the defendant, Daniel Jarman, is absolutely entitled to the personal estate of the testator: and his Honor doth declare, that the annuity of 150*l.* a year by the testator's will given to Daniel Jarman during his natural life, and the legacies in the will mentioned, payable at the death of Elizabeth Jarman, are chargeable on the real and personal estate of the testator in proportion to their values.<sup>(a)</sup>

Reg. Lib. 1830. A. fol. 1495.

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ALEXANDER v. MULLINS.

ROLLS.—1830: 6th December.

A person entitled to a share of a sum of money, which is due as a debt from a testator, cannot maintain a bill for his own share, unless he sues on behalf of himself and all other parties interested in the debt, or makes those other persons parties to the suit.

A TESTATOR bequeathed 800*l.* to his executor, upon trust, to pay the interest to Mr. Alexander during his life, and after his

(a) See *Campbell v. Harding*, *Malcolm v. Taylor*, pp. 390, 418, *supra*.

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death, to his wife during her life; and upon the death of the survivor, to transfer the principal sum to their children in equal shares.

Mr. and Mrs. Alexander were both dead, leaving four children, of whom the plaintiff was one. The testator's executor died without having made the investment as directed by the will. The bill was filed against the personal representative of that executor, alleging that the other three children had received their shares, and praying payment of the plaintiff's share of the legacy.

[\*569]     \*It appeared by the answer, that the other three children had not received their shares, though payments had been made to them on account.

The cause coming on to be heard, Mr. *Beames* objected that the other three children were necessary parties.

Mr. *West*, *contra*, insisted that where a legacy of a definite sum was given in equal shares to a definite number of persons, each of them was in the same situation as if he were, in form as well as substance, sole legatee of a given sum; and he cited *Smith v. Snow*.(a)

THE MASTER OF THE ROLLS was of opinion, that inasmuch as the executor of the original testator had been guilty of a breach of trust in not making the investment, and his assets were liable to make good this legacy, the suit was in truth a creditor's suit; and that a person, having an interest only in a portion of a debt, could not maintain a bill for the recovery of his share of the demand, unless he sued on behalf of himself and all other persons interested in the debt, or made those other persons parties.

His Honor, therefore, allowed the objection, and the cause was ordered to stand over.

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Clegg v. Clegg.

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\*CLEGG v. CLEGG.

[\*570]

ROLLS.—1831: 30th April, 4th May.

The testator upon the marriage of his daughter Catherine, covenanted to make her fortune equal to that of any one of his other five daughters. By his will he gave to Catherine absolutely a provision equal to that which he gave to any one of his other five daughters and their issue; but the fortunes bequeathed to these five daughters were limited to them for life only, with remainder to their issue; and in case any one of the five should die without leaving issue, her share was to go to the others of the four daughters and their issue, in the same manner as their original shares. One of the five died without issue: Held that Catherine could not claim an additional provision in respect of the benefits thereby derived by the other four daughters and their issue; her absolute interest in her own share being equivalent in value to the interests of the other daughters and their issue in their respective shares, and their contingent interests in the shares of each other.

JOHN CLEGG, having six daughters, Mary the wife of Mr. Gordon, Catherine Clegg, Ann Clegg, Alice Clegg, Sarah Clegg and Hannah Clegg, previous to and in consideration of the marriage of Catherine with William Clegg, executed a bond bearing date the 29th of December, 1785, in the penal sum of 3,000*l.* to be paid to William Clegg, his executors, administrators and assigns, with a condition, which, after reciting "that John Clegg had promised to William Clegg, that in case the marriage took place, he John Clegg, would, either during his life or by his last will, make the fortune or patrimony of Catherine Clegg equal at the least to the fortune or patrimony of any one of his other daughters," declared, "that if the said John Clegg, his heirs, executors, administrators or assigns, should from time to time and at all times thereafter, pay, give, grant, convey and assure unto Catherine Clegg or her issue, so much and such sum or sums of money, estate or effects, or things, and at such time and times as he the said John Clegg should at any time or times thereafter during his life, give, grant, convey or assure, unto any of them, the said Mary Gordon, Ann Clegg, Alice Clegg, Sarah Clegg, Hannah Clegg, or to any husband which any one of them had or thereafter might have, or to the children or issue of any one, exceeding in value the sum or sums of money, estate or estates, effects and



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things, which he the said John Clegg should then have paid, advanced, given, granted, conveyed or assured unto Catherine [\*571] Clegg or her husband, children or issue; and also should in and by his last will and testament or otherwise, make, cause, procure or effect the part, share, proportion or interest of Catherine Clegg or her children or issue, of, in and to the real and personal estate of him, John Clegg, to be at the least equal in value to the part, share, proportion or interest, of any one of them, the said Mary Gordon, Ann Clegg, Alice Clegg, Sarah Clegg and Hannah Clegg, and the husband of any of them, or the children or issue of any one of them, of, in and to the same (the several sum and sums of money, estate and estates, effects and things, which the said John Clegg should at any time during his life have paid, advanced, given, granted, conveyed or assured, unto each and every or any of his said daughters or their respective husbands, children or issue, to be taken and considered in part of and towards such part, share, proportion and interest, of, in and to such real and personal estate), and also if the said John Clegg had not at any time theretofore made, done, executed, entered into, published or declared, and should not at any times or time thereafter do, make, execute, enter into, publish or declare any act or acts, deed or deeds, last will or testament, or any other matter or thing whatsoever, whereby or by means whereof, the part, share or proportion, right, title, interest, benefit, advantage, claim, pretence or demand of any one of them the said Mary Gordon, Ann Clegg, Alice Clegg, Sarah Clegg and Hannah Clegg, or any husband which any one of them then had, or at any times or time thereafter might have, or the children or issue of any one of them, of, in, to or out of the real or personal estate which the said John Clegg at any time theretofore had been, then was, or at any time or times thereafter should be seized of or entitled to, was, were, could, should or might be greater, or exceed in value, be prior in commencement, in payment, or otherwise [\*572] preferable to the part, share and proportion, right, title, interest, advantage, benefit, claim or demand of Catherine Clegg, or her children or issue, of, in, to or out of the same real and personal estate of the said John

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Clegg"—then the bond was to be void, and otherwise to remain in full force.

John Clegg, by his will, dated the 27th of November, 1793, devised, after the death of his wife, freehold property in Oldham, late Wolfendens, unto and equally among his six daughters, in manner following: As to one sixth of it, on certain trusts for the benefit of Mrs. Gordon and her issue; and as to the other five sixths, unto his other five daughters, Catherine, Ann, Alice, Sarah and Hannah, equally, as tenants in common for their respective lives, and after their several deceases, he gave their respective shares to their respective child or children living at the time of such decease, and the issue of such of their children as should be then dead, their heirs and assigns, as tenants in common; the issue of a deceased child to take only the parent's share. He next devised certain premises for the benefit of Mrs. Gordon; and after reciting that he had given his other four daughters 1,000*l.* each, upon or since their respective marriages, he bequeathed to Alice and Hannah 1,000*l.* each. He then devised certain premises to his executors upon trust to sell, and bequeathed to them his personal estate upon trust to convert the same into money: and he directed that they should stand possessed of the proceeds of the sale of these real estates and of his personal estate, and of the securities in which they should be invested, for the equal and separate benefit of his five daughters, Mary, Ann, Alice, Sarah and Hannah, for their respective lives to their separate use; and after the decease of all or any of the daughters, upon trust to pay \*and ap- [\*573] ply her or their respective shares unto or amongst her or their respective children living at the time of her decease, and the lawful issue of such of them as should be then dead, the issue to take only their parent's share, and if any of them should have only one child, or issue of only one child, then the whole of the daughters' share was to go to such child or issue;" and if any of his five daughters Mary, Ann, Alice, Sarah and Hannah, should die without leaving any issue of her or their bodies then living, then in trust to pay the interest of such

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share or shares to the testator's other daughters for life, and the principal to their children and issue at such times and in such manner, shares and proportions as were thereinbefore directed for or in respect of their original shares thereof. He next devised certain premises to Catherine, her heirs and assigns; and after providing for the equalisation of the shares, in case the property given to Catherine should exceed in value that which each of his other daughters and their issue took, the will proceeded as follows: "and if it shall appear upon such equalisation, collection and contribution, as aforesaid, that the provisions hereinbefore and hereinafter made, for such of my daughters Mary, Ann, Alice, Sarah, Hannah and their issue, shall be of greater value than the provisions before made, for my other daughter Catherine Clegg, then, I hereby charge and make chargeable the estates and money, except the money given and bequeathed to my two daughters Alice and Hannah as aforesaid, hereinbefore and hereinafter given unto and in trust for my said daughters Mary, Ann, Alice, Sarah and Hannah, as aforesaid, with such sum of money to be paid to her, my said daughter Catherine, her executors, administrators and assigns, to and for her own use, as will make the provisions hereinbefore and hereinafter to be made for all my said daughters equal in value."

[\*574] \*All the six daughters survived the testator. Hannah afterwards died without having been married. Ann and Alice had no children. Arrangements had been made, by which an equalisation was effected between the share of Catherine and the respective shares of her five sisters, except in so far as the property bequeathed to the latter consisted of lands devised in trust to sell, which had not yet been sold.

The bill was filed by Catherine Clegg, who had survived her husband, and by her children, for the administration of the trusts of the testator's will. It charged that Hannah's share did not, upon her death, go over to Mary, Ann, Alice and Sarah, and their children, but that, by virtue of the bond, the plaintiff was entitled to participate in that share equally with the other four

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daughters and their children : and that if Ann or Alice should die without leaving issue them surviving, the plaintiff was also entitled to a share of the property devised or bequeathed to these two daughters.

Mr. *Bickersteth* and Mr. *Parker*, for the plaintiff.

Assuming that, before Hannah's death, the share of each of the six sisters was equal, it is clear that if Hannah's share be divided between Mary, Ann, Alice and Sarah, and their children, the families of each of these four daughters get more than Catherine and her children ; and the condition of the bond is broken. In no event, can any one of the other daughters and her children, consistently with the tenor of the bond, become entitled under the father's will to a greater share of his property than Catherine and her children : yet by the division of Hannah's share among them, to the exclusion of Catherine, the fortunes of each of them, derived from her father, will exceed Catherine's in the ratio \*of five to four : and this inequality may be ren- [\*575] dered still greater, if Alice and Sarah should die without leaving issue, and their shares should go in the manner directed by the will. In order, therefore, to fulfil the agreement contained in and enforced by the bond, Catherine and her children must participate equally with the other daughters and their issue in the share of Hannah, and in the shares of any other of the daughters who may die without leaving issue.

Mr. *Tinney*, *contra*.

Supposing the fortunes given to each of the daughters equal in amount, Catherine's, being given to her absolutely, would be of greater value than that of any of her sisters, who took subject to the contingency of their interest being defeated by their dying without leaving issue : and if Catherine were to derive any increase of fortune in the event of that contingency, she would get more than any of her sisters ; for no part of what is given to her could go to them, and she would have the chance of their fortunes devolving to her and her issue.

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The shares of each of the five other daughters is lessened in value to the original taker by the contingency to which the testator makes it liable; and this loss is compensated to each by the chance of participating in the fortunes of the other four. Thus there is equality among the five; and the share of each of the five, taking into account, on the one hand, the diminution of value from its being defeasible on a given event, and on the other hand, the chance of benefit to each from participating in what is given originally to the other four, is not more than equal to Catherine's.

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[\*576]     \**May 4th.*—THE MASTER OF THE ROLLS :—Upon the marriage of the testator's daughter Catherine, he entered into articles to give to her or her husband or issue, by deed or will, a provision equal in value to what he should give to any one of his five other daughters.

By his will, he gave to Catherine absolutely a provision equal in amount to that which he gave to any of his five other daughters; but the provision for his other daughters was limited to them for life only, with remainder to their issue, and if any of the five should die without issue, her provision was to become divisible between the other four daughters for life, with remainder to their issue in the same manner as their original shares. One of the five daughters died without issue; and a question in the cause was, whether, under the articles entered into by the testator on Catherine's marriage, she was entitled to share with the other four daughters in the share of the fifth daughter who had died without issue.

The provision for Catherine being given to her absolutely, she thereby takes an equivalent in value to the contingent interests which the five daughters took in each other's share; and she is therefore not entitled to claim any further provision in respect of the benefit derived by the four daughters from the share of the fifth daughter who died without issue.

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"His Honor doth declare that the plaintiff Catherine Clegg takes no share under the will of John Clegg, the testator, in the property given by the said will to Mary Gordon, Ann the wife, and now the widow of Thomas Close, Alice Clegg, Sarah Clegg, and Hannah Clegg, the \*five other daughters of [\*577] the said testator; and his Honor doth declare that the share of the said plaintiff Catherine Clegg, under the said testator's will, being given to her absolute use, she thereby takes an equivalent in value to the shares given to the said Mary Gordon, Ann the wife, and now the widow of Thomas Close, Alice Clegg, Sarah Clegg and Hannah Clegg, the five other daughters of the testator for life, with remainder and contingencies in the said testator's will mentioned; and his Honor doth declare that the equalisation already made, being in respect of the personal estate alone, and not including any equivalent for the value of the freehold and leasehold estates directed to be sold, but not yet sold, the plaintiff Catherine Clegg, is entitled to one sixth of such value, to make her share, under the will, equal in value to the share of her sisters, and that she is entitled for her life, to one sixth of the freehold estate in Oldham late Wolfenden's," &c.

Reg. Lib. 1830. A. fol. 3067.

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CLUTTERBUCK v. EDWARDS.

ROLLS.—1830: 29th April, 5th May. L. C. 1831: 19th and 22d November. 1832: 11th February.

A testator appoints a fund, after the death of his wife, to his son, to be paid to him at her decease, if he shall then have attained twenty-one; and in case his son dies under twenty-one, and after the wife, he gives the fund to his brother; and in case the wife shall outlive both the son and the brother, he gives it to the brother's daughters then living. The son attained twenty-one, and died in the lifetime of the wife, who survived both the son and the brother: there were daughters of the brother then living: Held, that the representatives of the son, and not the daughters of the brother, were entitled to the fund.

By the indenture of settlement, executed on the marriage of Bryan Edwards with Martha Phipps, two sums of 1,000*l.* and

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4,000*l.* were covenanted to be paid to trustees, on trust  
[\*578] to invest the same, and permit the \*said Bryan Edwards during his life, and after his decease, the said Martha Phipps, afterwards Martha Edwards, during her life, to receive the interest and produce thereof; and after the decease of the said Bryan Edwards and the said Martha Edwards, in case there should be any child or children of their bodies then living, to pay the said sums of 1,000*l.* and 4,000*l.* unto and amongst all and every of such child or children who should survive them both, and who should attain the age of twenty-one years, being a son or sons, or eighteen years, being a daughter or daughters, but not otherwise, at such times and in such parts, shares, and proportions, and in such manner and form as Bryan Edwards should, by deed or writing, or in and by his last will and testament in writing, to be signed, published and declared in the presence of two or more credible witnesses, give, direct, limit, and appoint: and in default of such gift and direction, limitation or appointment, as the said Martha Edwards (in case she should survive the said Bryan Edwards) should, in manner therein mentioned, appoint; and, for want of such appointment, then on trust to pay, apply and dispose thereof unto and amongst all such child or children, in equal proportions, if more than one, or if only one, then the whole to such one child, provided he, she, or they should then have attained, or should live to attain, being a son or sons respectively, the age of twenty-one years, or being a daughter or daughters respectively the age of eighteen years, but not otherwise; and, in the mean time, to pay the interest and produce thereof for the maintenance and education of such child or children respectively; but in case there should be no child or children living at the death of the survivor of the said Bryan Edwards and Martha his wife, or there being such, such child or children should not attain to the age or ages of twenty-one years, being a son or sons, or eighteen years, being  
[\*579] a daughter or daughters, then, on \*trust, to pay the said sums to the executors or administrators of the said Bryan Edwards, to and for their own use and benefit, and to and for no other use, trust, intent, or purpose whatsoever.

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The will of Bryan Edwards, which bore date the 6th of December, 1799, and was executed and attested in the manner required by the said indenture, after reciting the marriage settlement and the power of appointment, which he had under it, continued as follows, viz:

‘ And, whereas, I have at this time only one son living, named Zachary Hume Edwards, now I do, by this my will, by virtue and in pursuance and exercise of the said power contained in the said settlement, and of all other powers vested in me, give and bequeath, and direct, limit and appoint the said two several sums of 1,000*l.* and 4,000*l.* from and after the decease of my said wife unto my said son, Zachary Hume Edwards, to be paid to him on the decease of my said wife, if he shall then have attained the age of twenty-one years; and in case my said son die before he shall attain the said age of twenty-one, and after the decease of my said wife as aforesaid, I give and bequeath the said two several sums to my brother Zachary Bayley Edwards, his executors, administrators and assigns; and in case my said wife should survive my son, Zachary Hume Edwards, and also my brother, Zachary Bayley Edwards, then I do, by virtue of the powers in me vested by the said indenture of marriage settlement, give and bequeath the two several sums of 1,000*l.* and 4,000*l.* after the death of my said wife, unto and amongst such of the daughters of my said brother, Zachary Bayley Edwards, as shall then be living, to be divided equally between them share and share alike.”

The brother died in August, 1812, leaving several daughters. The son, Zachary Hume Edwards, attained the age of \*twenty-one years, and died in August, 1812. The [\*580] widow died in 1825, without having attempted to exercise the powers reserved to her in the settlement. Several daughters of the brother were living at the time of the widow's death.

The bill was filed by the representatives of the surviving trustee; and the question in the cause was, whether, at the death



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of the mother, the two sums mentioned became the property of the representatives of the son, or vested in the daughters of the brother?

Mr. *Wray*, for the daughters of Zachary Bayley Edwards

Mr. *Boteler* and Mr. *Rogers*, for the other defendants.

On behalf of the daughters, it was submitted that there was a clear and express gift to them, in case the testator's wife survived both the son and the brother; that that event had happened; and the plain effect of the words was not to be defeated by doubtful conjecture deduced from clauses which provided for a different state of circumstances.

THE MASTER OF THE ROLLS:—Where the language of an instrument is clear and consistent throughout, a court is bound to act upon the expressed intention, although it may not appear to be the most rational intention. If throughout this part of the will, it appear to be the clear intention of the testator that the interest should not vest in the son, although he attained twenty-one, unless he also survived his mother, then, however hard the case may be, his children can have no claim. By the first gift, the son would clearly take an absolute interest, although he neither attained twenty-one nor survived his mother, [\*581] the payment only \*being postponed till he attained twenty-one. It is probable, however, that the testator did not mean that he should take unless he did attain twenty-one, the effect of the second gift being, that if he died under twenty-one, after the death of his mother, the two sums should go over to the testator's brother; and these two gifts taken together import, that the interest would, at all events, vest in the son at twenty-one. The last gift is clearly a substitution of the brother's daughters for the brother, in case neither of the former gifts should take effect; but having taken effect by the son's attaining the age of twenty-one, the substitution is out of the question, and the son's representative is entitled.

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"The court doth declare, that the defendant, Thomas Fitzgerald, as the personal representative of Zachary Hume Edwards, is entitled to the 8,048*l.* 5*s.* 10*d.*, bank 3 per cent. annuities, standing in the names of Daniel Clutterbuck and Edward Baker, and 1,858*l.* 4*s.* 7*d.* bank 3 per cent. consolidated annuities, standing in the name of the plaintiff, under the bequest contained in the will of Bryan Edwards."

Reg. Lib. 1880. A. fol. 1727.

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*L. C.* 1831: *November 19th and 22d.*—The defendants, the daughters of the testator's brother, Zachary Bayley Edwards, appealed against his Honor's decree.

Sir *E. Sugden* and Mr. *Wray*, in support of the appeal.

It may be conceded as a general proposition, that in construing a settlement or will, which makes a provision for children subject to a prior life interest, the court leans strongly in favor of that construction by which the children will take a vested interest at twenty-one \*or marriage (the period [\*582] when they are likely to require it), whether they survive the tenant for life or not; *Woodcock v. The Duke of Dorset*, (a) *Hope v. Lord Clifden*, (b) *Shenck v. Legh*, (c) But that applies only to cases where the words are of equivocal and doubtful import. Where the language of the instrument is clear, consistent and unambiguous, the principle has no place, and the court must then give effect to the plain meaning of the words, without regard to the hardship which such a construction might possibly produce, under certain conceivable circumstances and in particular cases; *Wingrave v. Palgrave*, (d) *Hougrave v. Cartier*, (e) *Lloyd v. Bird*, (g) *Perfect v. Lord Curzon*, (h) In *Hotchkin v. Humfrey*, (i) Sir Thomas Plumer lays down the doctrine of the court

- (a) 3 Bro. C. C. 569.
- (b) 6 Ves. 499.
- (c) 9 Ves. 300.
- (d) 1 P. Wms. 401.

- (e) 3 V. & B. 79.
- (g) Cited 9 Ves. 305.
- (h) 5 Mad. 442.
- (i) 2 Mad. 65.

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upon this subject in very distinct terms ; and that case afterwards came by appeal before Lord Eldon, who affirmed his Honor's decree. Now in order to arrive at the true construction to be put upon this bequest, it is necessary to consider the will in connection with the marriage settlement. That settlement gave no power to Bryan Edwards to appoint, unless to a child who should survive both parents ; and the will, which was manifestly intended as an exercise of the power, and which studiously pursues the provisions of the settlement, is framed with a special regard to that circumstance. No one of the legatees is to take a single shilling until the fund, which was the subject of the settlement, falls into possession. The bequest is, *after the decease* of the wife, to the son, if he shall then have attained twenty-one ; and in case the son die before he shall attain twenty-one and after the decease of the wife as aforesaid, then the fund is to go to the [\*588] testator's brother ; and in case the wife \*survive the son (that is, whether the son attain twenty-one or not, for if he died before the wife, that circumstance was immaterial, as he was himself to take nothing in that event), and also the brother, then among the daughters of the brother who should be then living. All the three clauses are perfectly consistent and natural ; and it is impossible to import into the third clause containing the gift to the brother's daughters, the condition that the son should have died under twenty-one, contained in the second clause, without doing a manifest violence to the words, without, in fact, making to that extent a new will for the testator.

Mr. Boteler and Mr. Girdlestone jun., in support of the decree.

There is no substantial distinction between this case and the cases referred to on the other side, which, as it is admitted, have fully established the general rule of the court. It is not to be presumed that the testator could ever have intended, that if his son attained twenty-one in his mother's lifetime, and died leaving issue, such issue were to be excluded by the children of his brother ; nor can any reason be suggested why those children should be placed in a better situation than their father, who,

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*Chatterbox v. Edwards.*

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although he was a degree nearer in blood, and therefore a more natural object of the testator's bounty, was to take only in the event of the son dying under twenty-one. The will is recited to be made in pursuance of the power in the settlement, and of all other powers vested in the testator. It was plainly intended to operate, and it did in fact operate, as a disposition of the whole of the plaintiff's interest in the fund, in whatever character possessed, and from whatever quarter derived; and the ultimate limitation in the settlement having vested the property in Edwards, his executors, administrators and assigns, so as to make \*him in effect the absolute owner, it would be [\*584] unreasonable, for the purpose of aiding the appellants' construction, to confine it to that portion of interest only as to which the testator had a power of appointment given him in express terms.

*Mr. Rogers*, for other parties.

*Sir E. Sugden*, in reply.

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1832: *February 11th.*—THE LORD CHANCELLOR:—The question in this case arises upon the construction of Mr. Bryan Edwards' will—a will made in execution of a certain power contained in his marriage settlement, and of all other powers in him vested. The settlement does not appear very precisely to pursue what must have been the intention of the parties, and such as it is, the will misrecites it.

The will, in the part which raises the present question, appoints the fund, after the wife's death, to Zachary Hume Edwards, to be paid to him on her decease, if he shall then have attained the age of twenty-one, and if he die before twenty-one and after the wife's decease, to Zachary Bayley Edwards, the testator's brother; and if the wife survives Zachary Hume Edwards and also Zachary Bayley Edwards, then to Zachary Bay-

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ley Edward's daughters after the wife's death, then living. These daughters are the present appellants.

The events expressly and in terms provided for, then are—first, that of Zachary Hume Edwards attaining twenty-one and surviving the wife—and secondly, that of his dying under twenty-one and after the wife. Neither of these events happened, as the son died after \*attaining twenty-one, but before the wife. A third provision is then made, which may, though not expressly and in terms, cover the event which has happened, namely, that of the wife surviving both Zachary Hume Edwards and Zachary Bayley Edwards; for nothing is there said of the age at which Zachary Hume Edwards is supposed to die, and it may be above, as well as under, twenty-one. But I think this inconsistent with the plain and governing intention of the disposition. The event happened literally as this third provision contemplated; the wife did survive both the testator's brother and his son. But I hold the event which happened, of the son's attaining twenty-one, not to have been in the contemplation, and not to fall within the scope of this third clause.

Let us take the three provisions in their order.

The first appears to declare the governing intention of the whole disposition. [His Lordship here read the clause.] The testator had only the power of appointing after the wife's decease; but he also directs the sum to be paid on her decease at the legatee's age of twenty-one. If this clause had stood alone, there would have clearly been a gift to the son, if he attained twenty-one, but to be paid upon the death of the wife. If the son died under twenty-one, and before the wife, no provision is made for that event in terms; though the case comes under the third clause just as much as if he died after twenty-one. But if he attains twenty-one, the wife's death is of necessity the term of payment, she having the life interest in the fund. If he died under twenty-one and after the wife, the second clause provides for that event. [His Lordship here read the second clause.] This

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second clause is not at all inconsistent with the construction put upon the first. It only provides for \*the event [\*586] of Zachary Hume Edwards surviving the wife, but dying under age. Then the brother is to take, because, by the first clause, no interest was to vest in the son unless he attained twenty-one.

Then comes the third clause in these words: [His Lordship read the third clause.] The event which has happened, of the son reaching twenty-one but predeceasing the wife, falls, no doubt, within this clause. But it does not more fall within it than the event which has not happened, the event, namely, of the son dying under twenty-one and before the wife. The third clause then covers both these events equally, both of the son reaching twenty-one and not reaching that age when he predeceased his mother. But it appears plain that the one and the only one meant to be provided for is the latter, that of the son predeceasing his mother under twenty-one. Construing the third with the first clause this seems to be its true intent. The violence would certainly be great of the other construction, cutting out the grandchildren of the testator in favor of his nieces, and making the interest which the son took depend upon a contingency wholly immaterial, namely, his surviving his mother—material indeed as to the term of payment, but immaterial as to the vesting of the estate, and to make the nieces take an interest merely because their uncle's wife had survived his son, though their father, the testator's brother, was only to take any interest in case the son died under twenty-one.

It was said in the argument that the Master of the Rolls had struck out this third clause; but I think he must be held only to have so construed it that it might be consistent with the other clauses, with the prevailing intention, and with the rational sense of the whole instrument.

\*The view, therefore, which I take of the third [\*587] clause is this—admitting that it raises the most considerable difficulty in the case. The event of Zachary Hume

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Edwards' death, under twenty-one, and after the wife, had been provided for by the second clause in express terms: the event of Zachary Hume Edwards attaining twenty-one and surviving the widow had been provided for, in express terms, by the first clause. The death of Zachary Hume Edwards before the wife remained to be provided for, and that is done by the third clause; but as the second brought in the brother Zachary Bayley Edwards, on the supposition of his surviving the widow, so the third, contemplating the death of the brother before the widow, as well as the predecease of the son, brings in the brother's daughters; and the question being, with reference to this third clause, whether it shall be read in one or other of two ways, that is, as providing for the son's predecease, whether under or above twenty-one, or as providing only for his predecease under twenty-one; I read it, according to the general intention, in the latter way, thus, "in case my wife survives my son under twenty-one, and also my brother, then to my nieces."

If, indeed, the cases were so strong as to make it impossible to give the words this construction, there would be an end of the question, and the violence must be done to which I have adverted. But they are not so. In *Hotchkin v. Humfrey*(a) the bequest was, in case there should be no such daughter or son that should live to receive the same, then the term to be utterly void. There it was held that the fund was contingent, and that the shares out of it could not be vested, because, until [\*588] the surviving parent's death, it was \*impossible to tell whether the fund would exist by the term being raised. The Vice-Chancellor said, "the clear intent must govern, and in this case the clear intent is, that the surviving children shall take."

In *Wingrave v. Palgrave*,(b) which is always cited on questions of this kind, somewhat of the same view was taken. Lord Cowper reconciled the construction to a rational and probable

(a) 3 Madd. 65.

(b) 1 P. Wms. 401.

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intention in favor of the heir of the family, though the son of an after-taken wife, relying besides on the plain and invincible sense of the words—words, to use Lord Thurlow's expression "not to be got over."

In *Shenck v. Legh*,<sup>(a)</sup> though the Master of the Rolls expressed a leaning, perhaps a strong leaning, as to the construction of the gift over, yet he had no occasion to decide on that point; but the words there may be considered more hard to get over than the third clause here. Sir William Grant said if there had been anything equivocal in them, he would have construed them so as to vest the portions at twenty-one or marriage; and the rest of the case is favorable to the general view upon which this question would seem to have been determined below; as are also Lord Eldon's remarks in *Hope v. Clifden*.<sup>(b)</sup>

In the observations of Sir William Grant in *Howgrave v. Cartier*<sup>(c)</sup> I see nothing repugnant to the course here taken by his Honor. On the contrary they rather favor it. There, as in the present case, there was a clause which, as the Master of the Rolls said, taken by itself and literally, would confine the \*provision to children surviving both parents; and [\*589] in order to get rid of the effect of this clause, and construe it in the way most rational, his Honor rejected the word "such" and read it as if it had been "any child." As in *Powis v. Burdett*<sup>(d)</sup> the court got rid of the word "leave" and turned it into "have." The general observation to which no doubt his Honor referred, is that "if the settlement clearly and unequivocally makes the right depend upon the child surviving both or either parent, the court has no authority to control that disposition. If the settlement is incorrectly and ambiguously expressed, if it contains conflicting and contradicting clauses, so as to leave in a degree uncertain the period at which, or the contin-

(a) 9 Ves. 300.

(b) 6 Ves. 408.

(c) 3 Ves. & B. 79.

(d) 9 Ves. 428.



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Ex parte Inge.

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gency at which the shares are to vest, the court leans strongly towards the construction which gives a vested interest at the period when it is most needed."

Upon these grounds I affirm the judgment, without costs.(a)

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[\*590] \*EX PARTE INGE, IN THE MATTER OF CATHARINE HALL.

1831: 8th June and 25th July.

A person who endows a close fellowship in a college comprising other fellowships of an older foundation, will be presumed to be generally conusant of the statutes and rules of the college, and to mean that his fellow shall be subject to the same provisions with respect to election and admission as the other fellows, except in so far as those provisions are controlled by the express terms of the endowment.

Where, therefore, out of several candidates for a close fellowship, only one fulfilled all the conditions required by the endowment, that circumstance was held not to exempt him from the necessity of undergoing the usual college examination, to prove his fitness for the fellowship. But the standard of merit set up on the examination of such a candidate, should be not relative, but positive; merely ascertaining that he is duly qualified, and having no regard to the comparative qualifications of his competitors.

THE memorial of the Rev. John Robert Inge, addressed to his Majesty as visitor of Catharine Hall, Cambridge, among other things stated, that Samuel Frankland, formerly head master of a free school in Coventry, devised to the master and fellows of Catharine Hall, Cambridge, and to their successors for ever, so much of his personal estate, from and after the decease of his wife, as, together with his messuages or tenements and lands in Cambridge, should amount unto the value of 600*l.*, to the intent that 20*l.* a year out of the aforesaid lands and personal estate should be towards the maintenance of one fellow to be sent to the said Hall out of the free school in Coventry; the which, with

(a) See *Bright v. Rowe*, 3 Mylne & Keen, 816; *Tucker v. Harris*, 5 Sim. 538.

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a convenient chamber for which he had paid 60*l.*, would make a handsome provision for the Frankland fellowship.

By the same will, the sum of 10*l.* a year, out of the aforesaid lands and personal estate, was directed to be paid for and towards the maintenance of one scholar to be sent to the said Hall out of the free grammar school in Tamworth; and if the value of the sum of 600*l.* should in any way fall short, the scholar from Tamworth school was to bear the loss of what should fall short of paying him 10*l.* a year, the testator's will being, that \*the fellow from Coventry school should have full 20*l.* [\*591] per annum. And the testator's will further was, that "the nomination and election of the said fellow and scholar should be and remain to the master and fellows aforesaid, yet still so as they should have a careful regard to the recommendation of the mayor and aldermen of Coventry."

The memorial then stated, that by a receipt under the common seal of the master and fellows of the said college, dated the 29th of July, 1682, it appeared that they received of the said S. Frankland the sum of 60*l.* in consideration of a chamber of the yearly value of 8*l.*, to be from time to time forever thereafter, occupied and enjoyed in the said college by the fellow, for the time being, who should be in and enjoy the fellowship there founded by the said S. Frankland.

The memorial further stated, that the memorialist had been regularly educated at, and had been a scholar of the said free school of Coventry; that he went from that school to Trinity College, Cambridge, where he took his degree of bachelor of arts in January, 1827; that he was then duly ordained deacon, and after serving a curacy for a year, was admitted to priest's orders, and was appointed curate of a parish in Coventry by the head master of the free school of that city, which curacy he still continued to hold: that, in September last, a vacancy happened in the Frankland fellowship in Catharine Hall, and that he stood for that fellowship, with several other candidates, none of whom, however, had ever been scholars of the free school of Coventry: that he

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left with the Master of the College testimonials of character from various persons, clergymen and others, who had had opportunities of knowing his conduct and attainments, and in particular one from the head master of the \*Coventry free school, certifying that he had been a scholar and educated at that school, and had also been appointed curate of the parish in Coventry of which the said master was the rector.

The memorial further stated, that in the month of December last the election to the Frankland fellowship took place; and that notwithstanding the memorialist was the only qualified candidate, a person of the name of Smith, who was a member of Catharine Hall, but who had never been a scholar of the free school at Coventry, was elected to the fellowship.

Upon these grounds the memorialist submitted that he had a right, and ought to have been appointed to the fellowship in question, in preference to any other candidate; and he appealed to his Majesty the king, the visitor of the college, against the election of Mr. Smith, as being contrary to the will of the founder.

The application was referred, according to the usual course in such cases, to the Lord Chancellor.

The memorial was supported by the affidavits of several clergymen, who stated that, in their judgment, Mr. Inge was a gentleman of piety and good moral character, and of competent learning to entitle him to the Frankland fellowship. Counter-affidavits, with respect to the nature of the examination and the mode of election, were also filed by the college. The effect of these affidavits is stated in the Lord Chancellor's judgment.

Sir *E. Sugden* and Mr. *G. Richards*, for the memorialist, contended that the college, having accepted the benefits of [\*593] the Frankland foundation, upon certain \*conditions, in augmentation of their original endowments, was bound to observe those conditions strictly and in good faith; *Attorney-*

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*General v. Christ's Hospital*; (a) and that in rejecting Mr. Inge, who was not shown or alleged to be unqualified, and preferring Mr. Smith, it had violated the declared will of the founder and had been guilty of a plain breach of trust, which it was the duty of the visitor to correct. The college, like all similar institutions, was naturally desirous to convert what was now a private or particular, into an open fellowship. Fellowships confined to candidates supplied from a particular school or county or family, in the nomination to which the electoral body could exercise but a very limited degree of patronage and control, had never been much in favor either with the electors or the public; and of late years every effort had been made to throw them open, or to get rid of them entirely. (b) Nevertheless, where, as in the present instance, the terms of the foundation were clear and express, and the candidate who claimed the benefit of it had duly fulfilled the requisitions of the founder, it was not competent to the college to exercise a discretion in rejecting the applicant, unless the electors had some substantial and *bona fide* objection to him grounded on his moral or intellectual unfitness.

Sir C. Wetherell and Mr. H. Bailey, for Catharine Hall, and Mr. Jacob, for Mr. Smith, who had been elected to the Frankland fellowship in opposition to the memorialist, submitted that Mr. Frankland, like every other person who endows a fellowship to be annexed to an existing and long-established foundation, must be assumed to have been conusant of the general rules by which the body was governed in the election of its ordinary fellows, and to have intended that those rules \*should [\*594] equally apply to the fellowship instituted by himself. Mr. Inge, independently of the fact that he did not come directly from Coventry School to Catharine Hall, but had intermediately been a member of Trinity College, and therefore did not strictly fill the character required by the will, had wholly declined to submit to any examination, relying upon his supposed right to be elected as of course. So far from proving himself to be the

(a) 1 Russ. &amp; Mylne, 636.

(b) See W. Black. Rep. pref. ix.

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most worthy (which the electors had not required of him), he had not complied with the rules of the college, which made it imperative that every candidate for a fellowship, whether a close or an open fellowship, should approve himself *worthy*, by submitting to a regular examination, and satisfying the electors that he was qualified by his moral and religious character, as well as by his intellectual acquirements, to be permanently associated with themselves as a governing member of the society.

In the course of the argument the following cases were referred to: *The Attorney-General v. Clare Hall*,<sup>(a)</sup> *The King v. The Bishop of Ely*,<sup>(b)</sup> known also by the name of *St. John's College v. Todington*,<sup>(c)</sup> *Davison's Case*,<sup>(d)</sup> *Ex parte Wrangham*,<sup>(e)</sup> *The King v. The Benchers of Lincoln's Inn*.<sup>(g)</sup>

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*July 25th.*—THE LORD CHANCELLOR :—This case comes before me upon an appeal to the visitatorial jurisdiction of the crown exercised through the Great Seal, the king being the visitor of Catharine Hall; and it is the appeal of the Reverend [\*595] \*John Robert Inge against the decision of the master and fellows of that learned body, who have refused to admit him a fellow upon the Frankland foundation, on the ground that he declined to submit himself to a certain examination.

Mr. Inge was a bachelor of arts. He had undergone the examination which was necessary for obtaining that degree, but he refused to undergo any special examination with a view to his election to the Frankland fellowship.

That fellowship was founded by a person of the name of Frankland, who, in the year 1691, endowed it by his will, and appointed the choice in the following manner—[His Lordship

(a) 3 Atk. 662; 1 Ves. sen. 78.

(b) 1 W. Bl. 52, 71.

(c) 1 Burr. 158.

(d) Stated in Cowp. 319.

(e) 2 Ves. jun. 609.

(g) 4 Barn. & Cres. 855.

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here read the words of the will already set forth, and continued as follows :—]

Mr. Inge was educated at Coventry school, and brought with him the recommendation of the mayor and aldermen of Coventry ; although he had not come immediately from that school, a circumstance upon which an argument, not much relied upon however, was attempted to be raised against him. When the founder says the nomination is to be of a person to be sent to the hall out of the free school of Coventry, that the candidate must come directly from the *status pupillaris* of the school, to the *status* of a fellow of Catharine Hall, is a construction for which I see no pretence whatever, either upon the words strictly taken, or upon the sense, and reason, and principle of the thing. He must be a person who has been a scholar at the Coventry school, provided a person who has been there educated is fit to be a fellow at the time when he claims the fellowship. The mode of ascertaining that fitness alone raises the question on the present occasion ; Mr. Inge maintaining that it was sufficient \*for [\*596] him to present himself with the certificate of his having belonged to Coventry free school, and the certificate of the mayor and aldermen required by the founder ; and the master and fellows of Catharine Hall on the other hand, maintaining that he must undergo such an examination as is usual in that hall, before he can be admitted.

Now upon the fullest consideration I have been able to bestow upon this case, and it is one of no small importance with reference to the great collegiate institutions and endowments of this country, most of which, besides their own general fellowships, have had certain annexed fellowships given to them by the bounty of pious individuals, I am of opinion that when a new fellowship is annexed to an existing college or hall, the fellow is to be chosen according to the manner of election usually adopted in such college or hall.

When a man endows a fellowship, he knows the nature of the original foundation to which he wishes it to be attached ; he

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must be taken to be generally acquainted with its statutes, if not with the detail of its rules. He must, at all events, be presumed to be aware of the great inconvenience, not to say absurdity, that would result from endowing a fellowship to be held by a person who had not the qualifications, which would render him fit to associate with the other fellows, chosen for their good qualities, and learning, and morals, according to the ordinary rules of the foundation.

And this, which appears to be so consonant to every reasonable view, is also the view that has been taken by different courts in decided cases. I shall refer only to the case of *The Attorney-General v. Talbot*,<sup>(a)</sup> \*in which this was the subject of a great deal of elaborate discussion, and in which the then Lord Chancellor, Lord Hardwicke, laid down the principle in the plainest possible terms. It was the opinion of Lord Hardwicke, as is perfectly clear from that case, that when a person endows a fellowship, he is to be considered as cognizant of the rules prescribed for the admission of fellows into the college, cognizant generally of the qualifications required by the college, and as submitting his fellow to those rules; and intending not only that when such fellow has been elected, he shall be subject to the rules of the body, but that his mode of admission, also, and his entrance upon the fellowship, shall be according to the general provisions which apply to the case of the other fellows.

There is, however, one restriction, and a very proper one, which has in practice been imposed upon the rule in the admission of such fellows; and it is founded upon the peculiar nature of the fellowship itself. The general rule, as it was laid down by Dr. Dampier, the late Bishop of Ely—before whom, as visitor of St. John's College, Cambridge,<sup>(b)</sup> an appeal was brought in 1808, in disposing of which he was assisted by his brother, Mr. Justice Dampier, a judge of eminent learning, especially in this

(a) 3 Atk. 662.

(b) See a note of the judgment here referred to, p. 603, *infra*.

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branch of law—the general rule is, that the open fellowship shall be given to the best or most competent candidate in learning and morals, but the close or particular fellowship shall be given to the person coming from a certain school, or from a certain county or place, or from a certain family (for you have them of all these kinds); nevertheless not absolutely and because he has these qualifications and no other, but provided he has also the qualities without \*which his election would [\*598] only be a disgrace to the college, and a slur upon the memory of the founder himself.

Upon this principle, accordingly, that appeal was decided by the Bishop of Ely; but as it was not made public, I have only adverted to it on account of the authority of the learned judge to whom I have referred, and the very sensible and judicious manner in which the bishop expresses himself upon the subject.

Upon the same principle the usage has been, and a very fit one it is, that an examination of the candidate shall take place, and that while the general fellowship is given, by open competition, *digniori*, the particular fellowship shall be bestowed on the candidate who, though not *dignissimus*, is *dignus*, and who fulfils the other conditions required by the endowment. So that when an individual comes forward and claims a close or propriety fellowship, like the Frankland fellowship for instance, he is to be taken and examined apart; implying, not that he shall be rejected unless he excels the other competitors—those who might be competitors for a general fellowship—but that he shall be chosen, provided he is not disqualified by being *minus sufficiens* in learning or in morals.

The college proceeded strictly on this principle in the present case. They offered to examine Mr. Inge apart from the other candidates; thus clearly excluding open competition; for Mr. Inge brought with him the necessary recommendation of the mayor and aldermen of Coventry; but he declined to undergo any examination, on the ground, as I gather from his affidavit,



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that from what passed between him and the bursar of Catharine Hall, he was impressed with the belief that the college [\*599] \*had determined to elect out of the several candidates, the individual who should pass the best examination, without regard to the fact of Mr. Inge having been educated in the free school of Coventry, and being the only candidate from that school.

Now, the bursar, Mr. Burrill, by his affidavit, positively denies that he ever gave Mr. Inge any reason whatever to believe that the college had come to any such determination: and, indeed, that gentleman does not assert that Mr. Burrell ever so stated; for he only speaks as to his impression from what passed being to that effect. But Mr. Burrell's affidavit goes on to state, that "it was agreed upon by the master and fellows of Catharine Hall aforesaid, that the said J. R. Inge should be examined apart from the other candidates in consequence of his having been educated (as was alleged) at the free grammar school of Coventry."

The result of my inquiries into the practice, has furnished me with information respecting all the elections which have been had since the year 1711, when, upon the death of the founder's widow, who had a life interest in the property devised, the first election of a Frankland fellow took place. Mr. Palmer was the first who was elected upon this foundation, and he had the recommendation of the mayor and aldermen of Coventry [\*600] try;(a) but, in the year 1721, a Mr. Cramer \*suc-

(a) The following query was, in the year 1710, submitted by the college to Sir Edward Northey, then Attorney-General, previously to the first election of a Frankland fellow, "Whether the college must send down to Coventry to elect such boy, or may the master send from the school what boy he pleases, and the college make [choice of] those whom they think best qualified." Answer.—"I am of opinion that the college may make the election at Cambridge, the corporation being to recommend for their election, which will be made, on their judging of the ability of the person recommended; and although they are directed to have regard to, yet they are not bound by the recommendation, though I take it the founder did not intend they should refuse without reason. E. Northey, Dec. 26, 1710."

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ceeded him, against that recommendation, which was given in favor of another, a gentleman of the name of Cross, who was rejected. And one or two cases occur of the party having had no recommendation. There are ten or a dozen instances in all; but that is the only one in which the college have rejected the applicant; and properly so, I think, there being no other person whom the corporation of Coventry would recommend, and who was fit for the fellowship.

It may be said that the rule I have laid down, or rather I would say, have stated—for the principle of the rule is clearly recognized by Lord Hardwicke in the \*case re- [\*601]ferred to, and also by Lord Mansfield in another case reported in Burrow(a)—it may be said that that rule invests the college with a power to exclude the special object of the endowment, and to convert the particular into a general fellowship. That, however, I deny. It might be so, if there were no visitatorial power to superintend and control the electoral body. But this right of electing and rejecting certainly imports some degree of fitness; the very words used, “nomination and election,” imply that the appointment is not to be a mere matter of course. Election is choice; although that expression, it may be said,

It was also stated that the college were in possession of an opinion given at the same time by Sir Nathan Wright, in which he referred to and expressed his concurrence in the opinion of Sir E. Northey. If this statement were correct, the fact might seem to warrant an inference that Sir Nathan Wright, who presided in the Court of Chancery as Lord Keeper, from the year 1700 to 1705, returned to the practice of his profession after he resigned the Great Seal. Probably, however, Sir Nathan Wright may have been consulted rather as a friend of the college than professionally.

The first recommendation of a candidate for the Frankland fellowship by the mayor and aldermen of Coventry was as follows: “We, the mayor and aldermen of the city of Coventry, do recommend John Palmer, &c., who was educated at the free grammar school in Coventry, to the master and fellows of Katharine Hall in Cambridge, to be by the said master and fellows nominated and elected a fellow of the said hall, to fill the said fellowship, hoping that they will comply with this our recommendation, so that the said John Palmer shall appear to the said master and fellows qualified for such nomination. Dated 26th Feb. 1710–11.”

(a) *St. John's College v. Toddington*, 1 Burr. 158.

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might mean an election between persons coming from Coventry grammar school, when it would of course be for the master and fellows to decide who were the candidates to be chosen or rejected.

It may be objected, however, that to give them the power of rejection, on the ground of the candidate being *minus sufficiens*, is calculated to make the fellowship a general fellowship. My answer to that objection is, that this is a trust vested in certain persons, and to be exercised, like all other trusts, in perfect good faith and good conscience; and that if those to whom it is committed are found to reject—which is always a matter of circumstantial evidence, for in each case the examination of the candidate must be recorded—if they are found to reject candidates who indisputably possess the title contemplated by the founder, upon a mere pretext that they are deficient in learning or morals, the visitatorial power will then interfere and control them. For such conduct would be a fraudulent and unfaithful discharge of their office. But it must be a strong case to entitle the [\*602] crown to say they have fraudulently \*executed the trust, because, if they so acted, they would forfeit their character, and fail in the performance of a sacred duty.

I am therefore of opinion that no mischief is likely to arise from the right of election being exercised in this way, and that such right cannot be safely exercised in any other; the visitatorial power of the crown being always maintained, and the whole proceeding being constantly subject to the review of that power.

With respect to Mr. Inge himself, enough has been disclosed to show that all that was done on his part proceeded from mistake. Even if this had not so appeared, I should still have allowed him to go again before the master and fellows; for I should have deemed that he had acted under a mistaken view of his strict right, that he was entitled to have that strict right tried, and after it was found against him, I should have given him the

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same leave to go before them again, and with as peremptory a right, to be examined, as I should have given him, if the case had arisen upon a demurrer at law, and the demurrer had been overruled. For it would by no means follow that because he had mistaken his legal right, he was therefore to be excluded from all title; more especially as he appears to be a man against whose learning, morals and good conduct no imputation whatever is cast. Under such circumstances he has a perfectly good title, in my opinion, to go before the master and fellows again to be examined.(a)

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**\*EX PARTE ——— IN THE MATTER OF ST. JOHN'S COLLEGE, CAMBRIDGE. [\*603]**

1831:

Under a deed of endowment, directing that the master and fellows of a college shall elect into the fellowship thereby created and annexed to the college a native of a particular town, "if any such shall be found able within the university," the master and fellows may examine a candidate for such fellowship, who is duly qualified by birth, with a view to ascertain that he is "able;" and, if he is not found "able," may elect another candidate, who, without the qualification of birth, possesses the requisite "ability."

UNDER the terms of the deed by which the Beverley fellowship in St. John's College, Cambridge, was founded and endowed the master and fellows of the college were directed to "elect and choose into the said fellowship a person naturally born within the town of Beverley aforesaid, if any such shall be found able within the said university."

The following is the note of the judgment of Dr. Dampier, Bishop of Ely, the official visitor of St. John's College, Cam-

(a) With respect to the visitatorial power, in addition to the cases referred to in the argument, see *Usher's Case*, 5 Mod. 452; *Philips v. Bury*, 2 T. R. 346; *The King v. St. Catherine's Hall*, 4 T. R. 233; *The King v. the Bishop of Ely*, 2 T. R. 290, 5 T. R. 475; *Green v. Ruthenforth*, 1 Ves. sen. 462; *Attorney-General v. Black*, 11 Ves. 191; *Attorney-General v. the Archbishop of York*, 461, *supra*; *Attorney-General v. Crook*, 1 Keen, 121.

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In the Matter of St. John's College.

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bridge, with respect to an election to that fellowship, to which the Lord Chancellor referred in the preceding case.<sup>(a)</sup> The *gravamen* of the complaint to the visitor was, that although the appellant was the only candidate who was a native of Beverley, the college had elected, in preference to him, a gentleman of the name of Holmes, who had not that qualification.

"The appeal of . . . . ., Clerk, a member of your college, has been laid before me, in which he complains to me, as your visitor, of a wrongful exclusion of himself from a Beverley fellowship, to which, by virtue of a certain indenture, bearing date the 11th of July, in the 17 H. 8., and made between Nicholas Metcalf, then master of the college, and the fellows of the same, of the one part, and Dame Johane Rokeby and others, of the other part (a copy of which indenture was sent with the [\*604] appeal), he presumes that he was of \*right entitled.

The answer of the senior fellows, given with the consent of the master, under their common seal, together with certain exercises composed by the appellant while under examination as to his ability for the said fellowship, and the reply on the part of the appellant, in which by my permission he was indulged, have all and each of them been considered by me with that earnest, and most impartial attention, which was demanded from me in a question, in which I feel that the interests, as well of the college, as of the members of it who claim admission into the propriety fellowships, are materially concerned. The opinion which I have formed on these documents, and which I am about to declare, is founded on the fullest conviction of my own mind, and the most strict and impartial regard to the question itself, and the interests involved in it.

I begin by observing that the question is not as to comparative merit; because the appellant, supposing him to be "able" could claim to be elected as of right. If he is "able," he ought to have been elected, though there might have been twenty

(a) See p. 597, *supra*.

other persons, not born in Beverley, of better parts, and of superior attainments.

It is my further opinion that the statutes of the college, even had Dame Rokeby been wholly silent upon them, must be taken into consideration; because whoever is adding one member to a society, must be supposed to contemplate the nature of that society, the purpose for which it was erected, and the order and discipline established there to effect that purpose. But they are so far referred to as to show that they were in the mind of both the parties to the contract; and therefore the consideration of these statutes cannot be excluded from the interpretation of the word "able" in the deed.

\*The foundress, Dame Rokeby, must be supposed to [\*605] have intended to confer a benefit on the town of Beverley, by encouraging its inhabitants to bring up their sons to useful learning, otherwise she might have granted an annuity instead of founding a fellowship. The appellant's argument contradicts this, and says that she founded a fellowship, to attain which no exertion, no industry, no learning is required. A degree, however disgracefully acquired, and a capacity of getting into orders, is all that, according to his argument, can be exacted of a native of Beverly.

Is this any good to the town? Is it any good to the college? Could the college be supposed to have accepted the grant on such terms as would disgrace them by the incapacity of Dame Rokeby's fellow, and plant a licensed example of idleness before those who aspire to the fellowship?

The appellant and those who have claims to propriety fellowships are much mistaken when they suppose their "ability," or any similar qualification expressed in their respective deeds of foundation, is not to be estimated by the public examinations of the college, because these have been lately instituted. All regulations of discipline, whensoever adopted, are tests of the ability

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of those who seek, by whatever title, to become members of the college. In open fellowships the principle is *detur digniori*; in proprieties, *detur, sed digno*.

On the complaint of the appellant, that only the worst exercises were sent to me by the college, it is sufficient to observe, that they were such as the appellant offered on his examination for the fellowship.

[\*606] \*It is my opinion, that no local claim can compel the college to admit a member who would by his ignorance or incapacity disgrace the society, and frustrate the purposes for which it was founded. Had the society contracted so to do, their contract would have been against their statutes and void. But they cannot be considered as having entered into such a contract; ability to fill the office is necessarily implied in such a stipulation.

I therefore pronounce and declare that I concur with the college in thinking the appellant not "able" within the true meaning and construction of the deed; and the appeal of the said . . . . . is hereby dismissed, and the election of Mr. Holmes confirmed.

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PEARSON v. CARDON.

1831: 11th and 16th August.

Where goods in the hands of a bailee have been subsequently so treated and dealt with by the bailor as to constitute or acknowledge an apparent title to them in two distinct parties, the rule which prevents an agent from filing a bill of interpleader against his principal does not apply.

THIS was an appeal brought by Fermin De Tastet, one of the defendants in an interpleading suit, against a decree of his Honor the Vice-Chancellor. The case, upon the hearing in the court below, is reported in the 4th volume of Mr. Simon's Reports, p. 218.

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Sir *E. Sugden* and Mr. *Koe*, for the appeal.

The Solicitor-General (Sir *W. Horne*) and Mr. *Jacob*, *contra*.

The counsel for the appellant relied strongly on a recent decision of Sir John Leach, at the Rolls, in a case of \**Cooper v. De Tastet*,<sup>(a)</sup> from which they submitted that [\*607] the case under appeal could not be distinguished.

On the other side, *Clarke v. Byne*,<sup>(b)</sup> and *The East India Company v. Edwards*,<sup>(c)</sup> were referred to.

The material facts of the case, and the principal arguments urged in support of the appeal, are stated and considered in the judgment.

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*Aug. 15th.*—THE LORD CHANCELLOR:—This was a question arising upon a bill of interpleader. The plaintiffs Messrs. Pearson & Co. were warehousemen in London, who, in the months of April and May, 1818, received from Bize, Bordenave & Co. 38 bags of wool, which bags were to await the directions of the bailors, and the bailees were to have their usual warehousing charges allowed. On the 3d of July, 1819, a letter from Bize, Bordenave & Co. was received by the plaintiffs, who were thereby directed to transfer 94 bags of wool, including the 38 bags in question, and to hold them at the disposal of Fermin de Tastet. But there was a very important reservation contained in that order—and this is one of the circumstances on which mainly my opinion turns—a clause reserving to themselves (Bize, Bordenave & Co.) the privilege of drawing samples from the wools in those bags. The parties filing the bill of interpleader accordingly transferred the bags of wool in question into the name of De Tastet, in their books; and they continued so to hold them for De Tastet after

(a) 1 Tam. 177.

(c) 18 Ves. 376.

(b) 13 Ves. 383.



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that time, under the authority, however, of Bize, Bordenave & Co., and subject \*to the reservation which gave to the latter the right of drawing samples.

On the 29th of August, 1819, Mr. Roehm, who was agent for the defendant Cardon, delivered a letter to the plaintiffs, demanding the 88 bags, and stating that they did not belong to De Tastet, but to him, Cardon. This letter would have signified nothing, had it not been accompanied by another from Bize, Bordenave & Co., in which they said they concurred in the application, and requested the plaintiffs to act according to that letter, and offered to indemnify them for so doing. No mention was there made of any other or ulterior right, but they completely excluded the right of De Tastet—as completely as by the letter of the 8d of July, they had conferred it on him. The ground upon which Cardon claimed, was by a title paramount to theirs. He stated that the goods were his property, and that Bize, Bordenave & Co. had no right whatever to make them over to De Tastet. The firm of Bize, Bordenave & Co. may not very inaccurately be said to be only another name for Fermin De Tastet; for Bordenave was the nephew of De Tastet, and De Tastet was a partner in that house, interfering in the concerns of the firm in the months of April and May, 1818, when the deposit was first made, and also in the month of July, 1819, when the order to hold for his use was sent. On the 25 of August, 1819, between the date of the first and second orders, De Tastet quarrelled with his nephew and wrote him a letter, stating that the partnership between them was determined. He therefore considered himself (whether his nephew did so or not, we are not informed) as having ceased to be a partner from that day; and four days afterwards, and without the pretence of any notice of the dissolution of partnership to the bailees, comes the second order [\*609] from Bize, Bordenave \*& Co., which to all outward appearance, and for aught that the plaintiffs could conjecture, was to all intents and purposes an order from the same party from whom they had received the previous order.

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Such then are the facts of the case, with this addition, that we have in evidence the circumstances out of which arose the title of the defendant De Tastet; that is to say, that he had a claim for advances to the house and for profits, and that to cover the amount of that claim the transfer was made, he probably threatening his nephew with the consequences of his refusal.

Upon such a state of facts, can I hold this to be a common case of a claim by an agent against his principal, and of another party claiming by another title, foreign to the title of the principal? That an agent should have the power of filing a bill of interpleader when his principal demands the re-delivery of goods bailed with him, appeared to me so monstrous a proposition, and to involve such frightful consequences in mercantile transactions, that I could not suppose it was meant to contend for any such doctrine. For in fact it amounts to this, that an agent may at any moment treat his principal to a Chancery suit; and I was therefore relieved to find that the plaintiff's counsel went entirely on the peculiarity of this case.

And now, entirely adopting the doctrine of that case before the Master of the Rolls,<sup>(a)</sup> though the report must either be incorrect, or that learned judge has not in his judgment expressed himself with his usual very remarkable accuracy—for doubtless he there meant to point to the distinction between a party who was and \*a party who was not agent, to the [\*610] distinction between an agent and a mere stakeholder, and not to the distinction between a public and a private agent—I have no hesitation in stating it to be clear law that an agent cannot, *qua* agent, if there be nothing to distinguish his situation from the common case, have a bill of interpleader against his principal.

But can I here hold Pearson & Co. to have been the mere agents of Fermin de Tastet only? Certainly they were not so

(a) *Cooper v. De Tastet*, 1 Tam. 177.

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at first. But it may be said they became so afterwards, upon receipt of the letter from Bize, Bordenave & Co. I must then look to the terms of the letter constituting the agency, for that is their title deed as agents, and it is also the title deed of De Tastet.

If that letter had contained no clause reserving to Bize, Bordenave & Co., the right to draw samples, the case would have been materially different. But what can be less like a departing with the whole property, or tend more to keep it in a kind of suspense, than the power retained of drawing samples? What is meant by drawing samples? It means, with a view to sale. For what purpose is it retained? In order to deal and contract—that the party may be able to show the goods to intending purchasers in the market. The order of Bize, Bordenave & Co. does not say, “we are to have the power of drawing samples with the authority of our partner De Tastet.” It was quite unnecessary to say so; for if De Tastet was to have such a power, he could of course exercise it, seeing he was the owner of the wool as well as a member of the firm. The addition would have been required if the intention was to give to De Tastet the entire and exclusive property in the wool. In that case the reservation would have been, “provided we have the [\*611] authority of De Tastet.” The \*bailees could no more have refused to allow the drawing of samples, than De Tastet could have refused the payment of a bill of exchange drawn by the firm of which he was a partner. Can I therefore say, that this was such an out and out departing with the property, and delivery of it to De Tastet, or that it was such an order to a bailee to hold to the use of De Tastet exclusively, as vested in the latter the absolute property in the goods?

I greatly doubt whether it was such a delivery as would have deprived Bize, Bordenave & Co., of the right of stoppage *in transitu* for the unpaid price; or whether, supposing De Tastet not to have been a partner in that house, and a question to have arisen between Bize, Bordenave & Co., as sellers, and the bailee

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asserting the title of De Tastet, on the authority of the letter, this would have determined the *transitus*; the inquiry there always being—have the goods reached their journey's end? and that they have not done, unless they are entirely vested in the bailee. But here a power remained in the bailor. The clause qualifying De Tastet's control over the goods, and inconsistent with his possessing an absolute right of property in them, is a very remarkable circumstance. Into this, however, it is needless to enter. It is sufficient to say that this peculiarity exists. There is besides another peculiarity. Here is first a joint delivery by the bailors, Bize, Bordenave & Co., that is, by Bordenave and De Tastet together; and then the latter ceases to be a partner, and Bordenave alone, but using the name of the firm, countermands the former order, and desires the goods to be delivered to the defendant Cardon. Now this is precisely the case in which the paramount claim of Cardon, and the mesne claim of De Tastet coming \*into competition, a fit case . [\*612] for a bill of interpleader is raised.

It is quite clear, that to a party in the situation of agent, having no claim against his principal, no bill of interpleader will lie, if there be nothing to qualify the agency, and no privity between the principal and the other party claiming, so as to make them in a manner joint bailors. Observe the disagreeable situation of the bailee, for whose benefit and protection the remedy of interpleader lies. Observe the hard situation of the plaintiffs, Pearson & Co. They knew nothing of the change of partnership. But a letter comes to them in July, 1819, telling them to hold the goods to the order of De Tastet; and then comes another letter from the same party, telling them to deliver the same goods to Cardon. What could the plaintiffs know as to the relative situation of the parties? *Non constat* they knew that De Tastet was a partner in July. But they either knew that fact or they did not. If they did not, here is a house which orders them in July to deliver the goods to De Tastet; and the same house in August orders them to deliver the goods to Cardon, that is, it countermands its own order. If they did know

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that De Tastet was a partner in July, how did they know that De Tastet had ceased to be a partner before the countermand was given? There is no evidence to show, nor is it pretended, that the plaintiffs had any such knowledge.

With respect to the case of agency, the common law pleadings shed great light on this subject. There has succeeded to interpleader at law, a much more convenient mode of dealing with such questions, and one which I heartily regret has not been resorted to, and must blame the plaintiffs for not [\*618] adopting, in this instance, \*as it might have saved much expense and delay. When a wharfinger receives goods from A., and two conflicting claims are made upon those goods, he says to the claimant whose title he considers to be the best, "Take the goods, but give me an indemnity, and then let the other party bring his action against me; but I won't give them up, unless you indemnify me against the consequences." That offer has now become almost a matter of course; and though the wharfinger lends his name to the action, the real defendant is the person who has given the indemnity. This arrangement produces the whole effect of interpleader at law or in equity, and the action is tried once for all; and although the nominal parties are the bailee and one of the claimants, the real parties are the two conflicting claimants of the goods; one of them using the name of the person with whom the goods have been bailed.

That course has put an end to interpleader at law, and what now remains is only to be found in this court. But in looking at the rules of interpleader at law, you discover the principles that govern this court: because I hold it to be strictly a concurrent jurisdiction, and that you can have no interpleader here, if upon principle you could not have it at law. It is manifest that if two partners deliver goods, and then quarrel and claim the goods separately, the holder of those goods must have his remedy. The very case is provided for by the rules of pleading in bailment.

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M'Carthy v. Decaix.

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I have already stated the principle to be clear against an agent, as such, having a bill of interpleader. The circumstances of the present case, however, appear to me to take it entirely out of the general rule; and regard being had to the reservation of the right to draw samples, to the circumstance of De Tastet having been \*one of the firm, to his ceasing to be a partner only [\*614] four days before the countermand was given, and that unknown to the plaintiffs, to the fact that Cardon's paramount title had been sanctioned by what was, to all appearance, the same firm, but principally to the reservation of the power of taking samples—I cannot consider this to be the case of a mere agent bringing interpleader against his principal, or of a warehouseman against a merchant employing his warehouse.

The decree must, therefore, be affirmed, and with costs. My judgment proceeds entirely on the specialties of the case; and I have only entered into the general principle, on account of the case referred to, of *Cooper v. De Tastet*, not knowing the grounds upon which that case was decided by his Honor.(a)

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M'CARTHY v. DECAIX.

1831: 18th April, 9th May.

Where a person agrees to give up his claim to property, in favor of another, such renunciation will not be supported, if at the time of making it, he was ignorant of his legal rights, and of the value of the property renounced; especially if the party with whom he dealt possessed and kept back from him better information on the subject.

A sentence of divorce pronounced by a foreign court cannot defeat the rights acquired by parties under a marriage solemnized in England.

THIS was a suit instituted by the personal representative of Robert Tuite, deceased, against the personal representative of his wife, also deceased, for the purpose of recovering the arrears of

(a) See *Grasshay v. Thornley*, 2 Mylne & Craig, 1.

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M'Carthy v. Decaix.

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an annuity, to which, upon the death of the wife, and in [\*615] default of \*her appointment, Mr. Tuite, as administrator of his wife, had become entitled, by virtue of a settlement executed on their marriage. Mrs. Tuite died in the month of February, 1807: her husband took out administration to her estate and effects; and in the month of December, 1811, he died.

The defence set up was, that Mr. Tuite, soon after the death of his wife, had agreed to give up, and had actually renounced, all claims that might accrue to him under the settlement, or in his marital character, for the benefit of the family of his wife, from whom the settled property had been derived.

At the hearing of the cause, two questions were principally argued; first, whether the dealings and correspondence between Mr. Tuite and his wife's relations, in the years 1807 and 1808, were of such a nature as to amount to an absolute renunciation of all his interest in their favor; and, secondly, if they were, whether that renunciation was made at a time when Mr. Tuite was fully apprised of the extent of his legal rights, as the surviving husband and the administrator of his wife, and of the amount and value of her property.

At the hearing of the cause on the 12th of December, 1821, before Sir John Leach, then Vice-Chancellor, his Honor referred it to the Master to inquire and state to the court, whether Robert Tuite died in the intention of renouncing all interest in his wife's property in favor of her family, and whether before his death he was apprised of the circumstances which belonged to that property, and of the amount of the claim made in respect of the annuity.

[\*616] \*The plaintiff appealed against that decree. The petition of appeal was originally argued before Lord Eldon; but his Lordship having resigned the Great Seal before disposing of the case, it now came on to be reheard.

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*M'Carthy v. Decaix.*

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Sir *E. Sugden* and Mr. *R. P. Roupell*, for the plaintiff.

Mr. *Treslove* and Mr. *Stuart*, for the defendant.

The argument consisted entirely of a commentary upon the facts of the case, and upon the language of the correspondence which passed between Mr. Tuite and Mrs. Delattre (a sister of his deceased wife) and their respective solicitors. The peculiar circumstances of the case, and the effect of the letters, so far as they are material to the point with reference to which the case is here reported, are stated in the Lord Chancellor's judgment.

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*May 9th.*—THE LORD CHANCELLOR:—This was a case of considerable difficulty, long pending in this court, and much considered by Lord Eldon, who went out of office before he finally decided it on the appeal. The observations and notes of that learned judge upon the case, with which notes I have been furnished, show the great attention he gave to it, and the difficulty under which he labored with respect to the facts; and in consequence of those difficulties, it has received the greatest attention from me, and I have delayed pronouncing an opinion until I could look fully into the matter.

The case was this: A person of the name of Tuite contracted a marriage in this country with an Englishwoman; \*the marriage being solemnized in England, but he [\*617] being himself a Dane by birth, fortune and domicile. He afterwards removed his wife from this country, the *locus contractus* (with which he appears to have had no further connection), to the dominions of the King of Denmark, where his subsequent domicile continued to be; and in that kingdom the marriage was dissolved by a valid Danish divorce, as far as such a divorce could dissolve it; but which, I may observe in passing, by the law of this land could have no operation, as was fully established by the opinion of the twelve judges, who solemnly



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M'Carthy v. Decmiz.

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decided, after argument, that no proceedings in a foreign court could operate to dissolve or affect a marriage celebrated in England.

During the lifetime of Mrs. Tuite, and subsequently to the divorce, certain arrears of an annuity which she enjoyed under the marriage settlement, accrued, or were said to have accrued, amounting at her death to the sum of 7,000*l*. Prior to that event, a litigation in this court had been commenced, to which the claim to these arrears was incident. After the decease of both husband and wife, the result of the suit was, to put the party representing her in possession of those arrears, and two sums were actually recovered and paid to them, amounting in the whole to 3,631*l*.; and the whole of the question in this cause arises with respect to those sums, it being a conflict between the respective personal representatives of Mr. and Mrs. Tuite, upon the effect of a correspondence between Mr. Tuite and Mrs. Delattre, the sister of Mrs. Tuite, and her legal adviser Mr. Pinegar.

Upon that correspondence the whole question in dispute appears to turn. On the death of Mrs. Tuite, letters are [\*618] written by Mrs. Delattre representing her to \*have died in very poor circumstances; so much so that her debts were said to amount to more than all the little property she left could satisfy, even including her wearing apparel. Mr. Tuite, in reply, writes two letters to Mrs. Delattre, and in answer to her application to that effect, he at first refuses to execute a power of attorney to receive any funds that may become due, denying his right, because he insists it was a good divorce (nor indeed had it been decided till *Lolley's Case* in 1812-13, that a foreign divorce was of no effect as regards an *English* marriage); and he afterwards says, "If such a power is required, I would not have anything; her family is most heartily welcome;" and his language in another letter is—"I claim nothing, I would accept of nothing; nevertheless, in case it may by the form of your law be requisite, I give Messrs. S. and L. a power to act for me." How entirely he relied upon the marriage as being in other

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\ McCarthy v. Decaix.

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respects at an end, is manifest from the fact, that besides giving up the claim to the property of the deceased lady, he calls her by the name of Mrs. Trefusis, which was the name she bore before she became his wife.

It must, therefore, at least be admitted, that in giving this, which is called his renunciation, the husband labored under two capital errors, one of law, the other of fact; the one not superinduced by any suppression of circumstances on the part of Mrs. Delattre and her agent; whereas the other may be said to have arisen from their not disclosing facts, which there is every reason to believe they must have known; the latter an error which if they did not create, they had at least, to a certain degree, a share in maintaining.

When I state that the first of these was a great error in point of law, it is of the highest moment that no \*doubt [\*619] should exist on a matter of such paramount importance. I find from the note of what fell from Lord Eldon on the present appeal, that his Lordship labored under considerable misapprehension as to the facts in *Lolley's Case*; he is represented as saying he will not admit that it is the settled law, and that therefore he will not decide, whether the marriage was or not prematurely determined by the *Danish* divorce. His words are, "I will not without other assistance take upon myself to do so."

Now, if it has not validly and by the highest authorities in Westminster Hall been holden, that a foreign divorce cannot dissolve an *English* marriage, then nothing whatever has been established. For what was *Lolley's Case*? (a) It was a case the strongest possible in favor of the doctrine contended for. It was not a question of civil right, but of felony. Lolley had *bona fide*, and in a confident belief, founded on the authority of the *Scotch* lawyers, that the *Scotch* divorce had effectually dissolved his prior *English* marriage, intermarried in *England*, living his first

(a) See Russ. & Ry. C. C. 237, and 2 Cl. & Fin. 567, n.

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M'Carthy v. Decaix.

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wife. He was tried at *Lancaster* for bigamy, and found guilty ; but the point was reserved, and was afterwards argued before all the most learned judges of the day, who after hearing the case fully and thoroughly discussed, first at Westminster Hall and then at Sergeant's Inn, gave a clear and unanimous opinion, that no divorce or proceeding in the nature of divorce in any foreign country, *Scotland* included, could dissolve a marriage contracted in *England* ; and they sentenced *Lolley* to seven years' transportation. And he was accordingly sent to the hulks for one or two years ; though in mercy, the residue of his sentence was [\*620] ultimately remitted. I take leave to \*say, he ought not to have gone to the hulks at all, because he had acted *bona fide*, though this did not prevent his conviction from being legal. But he was sent notwithstanding, as if to show clearly that the judges were confident of the law they had laid down ; so that, never was there a greater mistake than to suppose that the remission argued the least doubt on the part of the judges. Even if the punishment had been entirely remitted, the remission would have been on the ground that there had been no criminal intent, though that had been done which the law declares to be felony.

I hold it to be perfectly clear, therefore, that *Lolley's Case* stands as the settled law at Westminster Hall at this day. It has been uniformly recognized since ; and in particular it was repeatedly made the subject of discussion, before Lord Eldon himself, in the two appeals of *Tovey v. Lindsay*(a) in the House of Lords, when I furnished his Lordship with a note of *Lolley's Case*, which he followed in disposing of both those appeals, so far as it affected them. That case then settled two points : first, that no foreign proceeding in the nature of a divorce in an ecclesiastical court could effectually dissolve an *English* marriage : and secondly, that a *Scotch* divorce is not such a proceeding in an ecclesiastical court, as to bring the case within the exception in the Bigamy Act,(b) for which nothing less than the sentence of an *English* ecclesiastical court is sufficient.

(a) 1 Dow. 117, 131.

(b) 1 Jac. 1, c. 11, s. 2.

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M'Carthy v. Decair.

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This then is a very important error which may have influenced Mr. Tuite in making this renunciation. And can I hold a party to be bound by an act or declaration made in ignorance of so material a fact? Was it not a \*most [\*621] material ingredient in forming his judgment and influencing his inclination? He might very well say, "I am no longer her husband; I give up all claim to her property," when he supposed the connection of husband no longer to subsist. And yet if he had been told that he was still her husband; that no power could dissolve the marriage; that he was liable, in his person and property, for her debts; that the tribunals of his own country would acknowledge this to be the law; that as he undertook the relation *cum onere*, so also he was beneficially entitled to whatever was the property of his wife, be it small or great; it is impossible to say that this knowledge might not have altered his intention; for if a man does an act under ignorance, the removal of which might have made him come to a different determination, there is an end of the matter. What he has done was done in ignorance of law, possibly of fact; but in a case of this kind that would be one and the same thing.

These considerations do not appear to have been sufficiently adverted to in the court below. I cannot help thinking, besides, that taking the case at the lowest, Mr. Tuite and Mrs. Delattre were, at the time of the supposed renunciation, in a state of ignorance as to some other most material facts; and it is impossible to say, that a person shall be held to what he has done under circumstances which have been so erroneously represented to him, however innocently the representation may have been made. Who can venture to predict what might have been Mr. Tuite's course had he known how the facts really stood? If a man, separated and living at a distance from his wife, receives a letter telling him that she is on her death-bed, and that she leaves no assets—not enough to pay the costs of her funeral; and he writes in reply, "I shall not interfere: she is no \*wife of mine:" it is impossible to say that he shall be [\*622]

bound by that disclaimer, made under the influence of a common error.

Doubtless, if with a full knowledge that the wife's property might be large or might be small, he distinctly gave up all title to it, whatever might turn out to be its value, his disclaimer would be good. But if he entertained a *bona fide* belief that she died insolvent, it would be going far to say that his renunciation should bind him, or that the other party should have a right to hold him to it. In *Cocking v. Pratt*,<sup>(a)</sup> where Sir John Strange had to deal with the case of a mother contracting with her daughter as to her share of the father's personal estate, he held the transaction to be void, on the ground that the mother plainly had better information than the daughter. But even if it be assumed that Mrs. Delattre knew no more of the real facts than Mr. Tuite, *Willan v. Willan*,<sup>(b)</sup> is an authority to show that where both parties were in a state of equal ignorance as to the facts respecting which they were dealing, the transaction will not be supported.

It is unnecessary for me, however, to decide as to the law on this point, because when the evidence is narrowly scrutinized, the circumstances of the transaction relieve the case from all difficulty, showing that there is every reason to believe that the wife's relations, living in England, must have known, and did, in point of fact, know a great deal more than Mr. Tuite, the foreigner, living in Santa Cruz; and bringing the case, therefore, directly within the principle laid down by Sir John Strange in *Cocking v. Pratt*.

[\*623] [\*THE LORD CHANCELLOR then entered into a detailed examination of the language and effect of the correspondence between the parties, and expressed his opinion that the conduct and letters of Mrs. Delattre and her agent clearly indicated that they were better informed as to the state of Mrs. Tuite's property than her husband, and were well aware it was

(a) 1 Ves. sen. 400.

(b) 16 Ves. 72.

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Goblet v. Beechey.

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not of that insolvent description which had been represented. His Lordship then continued :]

On the whole it is sufficiently established that when Mr. Tuite agreed to give up any claim to his wife's fortune, he was acting under a misapprehension in two most material particulars: in the first place, he believed that Mrs. Tuite, at the time of her death, had by law ceased to be his wife, an impression which seems to have been the mainspring of his liberality; and, secondly, he was wholly ignorant, or rather he was positively misinformed, with respect to the amount and value of her property, and his ignorance certainly was not shared, at least in an equal degree, by the parties with whom he was dealing.

Upon these two grounds I am clearly of opinion that the agreement cannot be supported as a valid renunciation by Mr. Tuite, and that the judgment of the court below must be reversed.(a)

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\*GOBLET v. BEECHEY.

[\*624]

1831: 7th and 9th May.

A testator by his will gave a specific chattel to A. Afterwards by a codicil, he gave a number of articles of a different kind, and of much less value, to B, and in enumerating those articles, introduced an imperfectly written word which might be supposed to designate the chattel previously given to A: Held, that the bequest to A. was not thereby revoked.

If property described in distinct and unambiguous terms is bequeathed to a particular person, a subsequent bequest of the same property to another must, in order to be effectual, designate the subject matter of the gift in words so legibly written that no reasonable doubt can be entertained with respect to them.

THE will and codicil upon which the question arose are stated by Mr. Simons,(b) in his report of the case before the Vice-Chancellor.

(a) The judgment of the Lord Chancellor in *McCarthy v. Decatiz* was cited and much relied upon in the recent case of *Warrender v. Warrender*, in the House of Lords, 9 Bligh, N. S. 89; 2 Cl. & Fin. 488; 2 Shaw & Maclean, 154.

(b) 3 Sim. 24.

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Goblet v. Beechey.

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His Honor having overruled the exception, and declared that the plaintiff was entitled to the models which the testator possessed at his death, or to the money which the sale of them had produced, amounting to the sum of 738*l.* 13*s.*, the exception was now reheard.

Sir *E. Sugden* and Mr. *Jacob*, for the exception.

The *Solicitor-General* and Mr. *Sidebottom*, *contra*.

In the course of the argument the Lord Chancellor expressed a clear opinion that the evidence of the female servant who attested the will, with respect to the meaning of the word "mod," as stated to her by the testator at the time of attestation, was properly rejected in the court below.<sup>(a)</sup>

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THE LORD CHANCELLOR:—This testator, who had previously by his will, and in express terms, disposed of his models at the time when he was disposing of all the rest of his collection, by a \*subsequent codicil, being the 11th to that [\*625] will, in a very unintelligible enumeration of articles, coupling them with tools, bankers, and marble in the yard, introduces the word "mod," with what seems, and may be supposed to be, a hyphen, a point, a blot, or a small *s* affixed, and the present question is as to the meaning of that word. The Master called to his assistance Mr. Caley, a gentleman skilled in writing, and also Mr. Garrard, who is said to be an eminent statuary, and he has adopted the opinion of Mr. Garrard as to the writing, instead of that of Mr. Caley, and found that the word "mod" was a contraction for "models."

Now, if I am to be bound by the evidence, the opinion of Mr. Caley, is at least as good as that of Mr. Garrard. Although the former professed himself unable to form any opinion as to what

(a) See 3 Sim. 26.

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Goblet v. Beechey.

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word was meant to be expressed by the characters in question, he thought there was no *s* affixed. But in what company is the word "mod" found to occur? It is found, not among articles of value, but thrown in among the tools in the shop, bankers (which are great benches), the rasp, and something which is supposed to mean the testator's apron. It is, to say the least of it, singular that the testator should have introduced his models, which were of very considerable value, and were the very apple of his eye, among such an assortment. That is one reason. Another is that the word "models" which occurs at full length in the will, would, upon this construction, be done away with, and that without any direct words of revocation, such as are found in the other codicils, where revocation was plainly the testator's object, and without any certainty as to what he really intended. He would thus by a doubtful, or rather by a half word, revoke that which he had previously disposed of in formal terms.

\*I have great doubts whether if this were the case of [\*626] a will of real property, in which the testator had made a formal devise of all his estates, and afterwards in a codicil had introduced the letters "est" in the middle of a gift of his pictures, books, cash at his banker's, furniture, &c., the codicil would be effectual to carry the estates previously given. It would be most dangerous to allow it to operate as a revocation of a previous devise which had been solemnly made.

Upon these grounds I am of opinion that the exception must be allowed.



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Miles v. Langley.

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MILES v. LANGLEY.

1831: 11th and 27th May.

Under an agreement of exchange between A., who held lands under a college lease, and B., the owner of an adjoining estate, B. occupied part of the college lands, and A. had occupied, along with the residue of the leasehold part of B.'s estate. A. having become bankrupt, the college leasehold was sold, and was described in the particulars of sale as "late the residence of A.:" Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation.

THIS cause, reported on the original hearing at the Rolls in vol. i. p. 39, *supra*, now came on to be reheard before the Lord Chancellor.

The *Solicitor-General*, Sir Charles Wetherell, and Mr. Wilbraham, for the plaintiff, who appealed, relied strongly upon *Daniels v. Davison*(a) and *Taylor v. Stibbert*,(b) cases which, they submitted, were not distinguishable in principle from the case before the court.

Sir Edward Sugden, Mr. Tinney, and Mr. Benson, *contra*.

[\*627] \*THE LORD CHANCELLOR:—This is an appeal from his Honor, the present Master of the Rolls; and the case below depended entirely upon the question, whether Langley, who purchased under a bankruptcy from the assignees of Hellicar, had at the time of his purchase actual or constructive notice of the agreement between Hellicar and the party under whom the plaintiff claimed. Some evidence was adduced with the intention of showing that he had actual notice: this, however, failed entirely; and the only remaining question was, whether he had constructive notice, or what in this court would amount to notice of the agreement.

An ejectment had been brought by the defendants, and the bill was filed for an injunction and for the specific performance

(a) 16 Ves. 249.

(b) 2 Ves. jun. 437.

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Miles v. Langley.

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of the agreement, which was for an exchange of a small parcel of land, and had been entered into so long ago as the year 1798.

It was contended on the part of those who resisted the injunction and the specific performance, and who denied notice to Langley, that there was no allegation of notice in the bill. On looking into the pleadings, however, it appeared that there was a specific charge of notice in the bill, and a denial of that allegation in the answer. Still the question remained, whether there was constructive notice of the agreement.

The case is one of considerable hardship whichever way it is determined, and it might possibly have been a case of less hardship if his Honor had decided it the other way, and admitted that there was enough in the circumstances of the case to amount to implied notice. It is a case in which one of two persons must sustain some degree of injury; but the decision cannot be \*governed by the consideration which of the two [\*628] shall receive the least injury, though undoubtedly the hardship to one may be greater than that which falls upon the other.

His Honor was of opinion, that the case of *Daniels v. Davison*,<sup>(a)</sup> on which much reliance was placed by those who argued that Langley had notice, did not go so far, and that to decide in favor of notice in this case, would be carrying a step farther the principle adopted in *Daniels v. Davison*; inasmuch as Lord Eldon there "held that a party was bound to inquire of the occupier of the land which he was about to purchase, what was the title under which he occupied; and was, therefore, to be considered as having implied notice of the nature of that title." The rule in *Daniels v. Davison* goes, no doubt, a good deal farther than his Honor states: because if a person with whom I contract to purchase is not himself in the occupation of the land, but possesses it by a tenant, that is undoubtedly a circumstance

(a) 16 Ves. 249.

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Miles v. Langley.

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sufficient to fix me with notice that there is a tenant on the land; and, according to *Daniels v. Davison*, I am called upon to make inquiry of that tenant, and to look to the title under which he possesses. For possession is *prima facie* evidence of the ownership of the fee; and if I am buying the fee from one who is not in possession, and a tenant hold under a lease, that is notice to me that he is a tenant, and I am bound to look to the nature of the title as between him and his lessor. The case of *Daniels v. Davison* was certainly understood on the other side of the hall to carry the principle much farther; for if I rightly recollect, it was there held that a purchaser was fixed with notice of a collateral agreement, between the lessor and the lessee, [\*629] \*for the purchase of the premises demised. This was carrying the principle a great deal farther, because the existence of such an agreement was by no means a presumption arising *prima facie* from the fact of possession. Accordingly it has always been considered that *Daniels v. Davison* went a great way. "Am I, then," says his Honor, "in the present case, to carry the principle a step further?" That question he answers in the negative; and I fully agree with his Honor.

After the best attention which I have been able to give to this case—though it is certainly difficult to decide it satisfactorily either way, and hardship must necessarily be inflicted on one of the parties; but having looked into all the facts and the evidence in the cause, not excepting the attempt which was made to dispute altogether the title of the plaintiff, independently of the question of notice, and having compared the circumstances here with those in *Daniels v. Davison*, I have upon the whole, come to the conclusion that in the present case it would be carrying *Daniels v. Davison* a material step further, if Langley were to be held fixed with notice. I shall not, therefore, disturb the decision of the Master of the Rolls.

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Godfrey v. Littel.

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\*GODFREY v. LITTEL.

[\*630]

1831 : 15th June.

In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish, by the admission of the defendant or by evidence, a clear legal title to some land in the possession of the defendant, and also a ground for equitable relief; and where the quantity of the land of the plaintiff, in the possession of the defendant, is doubtful upon the evidence, the court will direct a commission or an issue, as will best answer the justice of the case.

THE defendant appealed from the decree of the Master of the Rolls, in this cause. The judgment of his Honor upon the hearing in the court below is reported in 1 Russell & Mylne, 59.

The *Solicitor-General*, Mr. *Skirrow* and Mr. *Wigram*, in support of the appeal, insisted that according both to principle and practice, two things were necessary to be established by a plaintiff, before he could call upon the court to issue a commission to ascertain boundaries; first, he must satisfy the court that he had a title to some portion of the land with respect to which the relief was prayed; and next he must show the quantity of land in acres, or in some other measurement, to which he was entitled. If he failed in the first point, no decree whatever could be made, and his bill must be dismissed. If he failed in the second, the court might either undertake to investigate and decide the question for itself, upon the evidence brought before it or under a reference to the Master; or else, if that course were found more convenient, it might send the matter to be tried by a jury upon an issue. But it was not the province of a secret and irresponsible body like commissioners of partition to investigate and determine a question of title. The Master of the Rolls considered it discretionary either to grant an issue or a commission. But this court had no right to delegate to the decision of commissioners what was in fact matter of law. The court might and often had directed an issue in such cases; and, assuming (what was by no means admitted) that the plaintiff in this case had made out the first \*point, namely, his right to some [\*631]

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Godfrey v. Littel.

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portion of the intermixed lands, the defendant would not have complained if that course had been adopted here. But he protested—and in that protest he was borne out by all the authorities in which the point had been taken, and especially by the language of the decree in *The Duke of Leeds v. The Earl of Strafford*,<sup>(a)</sup> as it appeared in the Registrar's book—against being compelled to submit to the judgment of commissioners of partition a grave and complicated question of fact and law, a question which they were wholly incompetent to determine.

In addition to the authorities cited in the former argument, the following cases were referred to; *Webb v. Banks*,<sup>(b)</sup> *Winton v. Newland*,<sup>(c)</sup> *The Bishop of Durham's Case*,<sup>(d)</sup> *Norris v. Le Neve*,<sup>(e)</sup> *Attorney-General v. Fullerton*.<sup>(g)</sup>

Sir Edward Sugden, Mr. Rose and Mr. Lowndes, *contra*.

THE LORD CHANCELLOR:—This branch of the jurisdiction of the court appears to have drawn from many learned judges, and particularly from Lord Northington, who presided for some years in this court, expressions of considerable—I will not say disapprobation, but doubt. Lord Thurlow concurred with Lord Northington in manifesting an inclination rather to narrow than to extend the jurisdiction of the court in this respect; [\*632] nevertheless it is certain \*that there is, in this court, a jurisdiction applicable to cases where there arise an uncertainty and confusion of boundaries, by means of which jurisdiction such uncertainty and confusion are removed and cleared up, and the rights of the parties interested ascertained. In such a case as the present, where we find a tenant giving up a lease and retaining a part of the land demised, it being uncertain how

(a) 4 Ves. 180.

(b) 2 Eq. Ca. Ab. 164.

(c) Seton on Decrees, 200.

(d) 12 Vin. Ab. 267.

(e) 3 Atk. 82.

(g) 2 Ves. & B. 263; see also *Attorney-General v. Bowyer*, 5 Ves. 300.

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much the tenant ought to have given up, but clear to the court that some part was retained—for it is this which constitutes the ground of the jurisdiction—in such a case it is certain that this court has the power to remedy the mischief, by granting either a commission or an issue, as either of these may best meet the justice of the case, or be most expedient, with a view to ascertaining the rights of the parties.

The first question is that upon which the whole jurisdiction of the court, and, consequently, the decree of his Honor the Master of the Rolls is founded; namely, whether some portion of the demised land was retained by the tenant; though if any were retained, *non constat* how much, and possibly *non constat* where the land so retained was situated.

Before making any observation on the facts upon which my opinion is formed, in consonance with that of the Master of the Rolls, it is necessary that I should advert to a pretence set up, according to the case in Bunbury,<sup>(a)</sup> that satisfaction in this court can be obtained by the party seeking a commission in one case only, namely, on the admission of his title by the party against whom the relief is sought; and, by admission, I take to be meant admission on the pleadings. Now, I entirely agree with his Honor that if this were so, there \*could [\*633] be no such remedy as a commission to ascertain boundaries; for the defendant would, in every case, take especial care to deny the plaintiff's title, and so deprive him of his remedy. "If the defendant (it is said) doth not admit the plaintiff's title, but denies that he has any lands in his possession belonging to the plaintiff, in such case a court of equity will not grant a commission, because that would be admitting the plaintiff's title in general, though the particular lands were not known."

I take the meaning of this to be, that if an admission be made by the defendant that he has in his possession *some* lands belong-

(a) *Bishop of Ely v. Kewrick*, Bumb. 322.

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Godfrey v. Littel.

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ing to the plaintiff, though it does not appear where or what, that is a case for a commission; and the contrary, if no such admission be made—a conclusion contrary to all principle, and which seems justly to have met with the disapprobation of Chief Baron Comyns, who was for directing an issue.

The position laid down in *Bunbury* is indeed contradicted by the other cases; and in *Wake v. Conyers*,<sup>(a)</sup> Lord Northington, though strongly disposed to dismiss the bill, and though he talks of the frightful consequences arising from such commissions, preferred accomplishing his object by taking another ground for the dismissal of the bill, namely, that the manorial rights claimed by the plaintiffs were incorporeal hereditaments, and that the defendants were entitled to the soil and freehold in the estates in question. This therefore proves that Lord Northington not only did not acquiesce in the principle attempted to be established in *Bunbury*, but that he wholly repudiated the authority of that case.

[\*684]     \*The law being admitted, the question is as to the facts in this case, and I have no hesitation in saying that I am perfectly satisfied with his Honor, upon the whole of this evidence, that a part at least of these lands (which have been demised by the college from a period as far back as the reign of Elizabeth down to the last lease granted to the present defendants in 1789)—a part at least, though it does not appear exactly what part or how much, was situated on the north side of the Chaseway, and this part so leased by the college is admitted to be still in the possession of the defendant.

The party claiming the commission has supported his claim upon two grounds; first, the amount and species of acreage; and, secondly, the evidence of terriers, and the testimony of witnesses. With respect to the acreage, the sixty acres alleged by the plaintiff to be statutory acres are affirmed on the part of the defendant to be customary acres. I put entirely out of view

(a) 1 Eden. 331, 2 Cox, 369.

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Gedfrey v. Littell

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however, the argument on the part of the defendant, by which the words "by estimation" in the lease were referred, not to the amount, but to the kind of acreage. The words "so many acres by estimation, be the same more or less," are the ordinary phraseology in leases, from the time of Elizabeth down to the present day; and any trifling variance in the collocation of the words can make no difference as to their meaning. The three score acres by estimation are clearly referable to the number, and not to the kind of acres computed. But then it is said, there is evidence of a customary acre of three roods, and that, taking in the road, there would be forty or forty-five acres, sufficient to satisfy the exigency of the defendant's argument; for the defendant relies on this, that the three rood acre is applicable to unin-closed land, and the statute acre \*to inclosed land. This [\*685] would at once raise the question, whether those lands, when they were demised in the reign of Elizabeth, were or were not inclosed lands. And I say that upon the evidence of the lease, the lands were inclosed and not common; for I find the words "hedge-bote" and "style-bote" in the lease—a proof that there must have been an inclosure running across. We must take statutory acres, therefore, and not the alleged customary acres, to be applicable to these lands; and by the expression "three score acres, be the same more or less," we can only understand a quantity of land a little exceeding or a little falling short of sixty statute acres; a difference of fifty per cent. could never have been intended. Now forty acres only have been given up instead of sixty.

That is a strong fact; and another strong fact is that the defendant who relies on his own title and his own possession, has not taken care to satisfy the court below and this court in what right he possesses the two fields called the Oxleys. I should like to see by what title he possesses those fields, and whether by any other title than that alone, by which I have a vehement suspicion he holds—I mean a title by usurpation or retention, as against the college. It is a very remarkable circumstance, that Mr. Littell should have possessed in his own right those two fields



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Godfrey v. Littel.

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and no other land whatever on the left side of the Chaseway. All the evidence goes to this; except one piece of testimony of a very frail character, seeing that it comes from the party interested *post litem*, when it rarely happens that a man states anything to destroy and defeat his own claim. The evidence as to abutments, furnished by the Court Rolls, of the adjoining manor, goes also strongly to show that what are now called the Oxleys, are in fact part of the Lacy field.

[\*636] \*Last of all comes a very remarkable piece of evidence founded on the circumstance that the lands are stated to be in two parishes and in two counties, a fact which appears by the map of the defendant himself. At the corner of the map on the right hand of the Chaseway there is this note by the surveyor, "three counties here meet." Spots of this description, like the *trivix* of the ancients, are usually distinguished by some remarkable natural or artificial boundary, such as a ditch, a road, a river, or a hill. The Chaseway, therefore, we might naturally suppose to be the boundary of two of the three counties, namely, Cambridge and Suffolk. And this supposition is consistent with the lease by which lands in Cambridge and Suffolk are demised, but is inconsistent with the defendant's claim; for the defendant's case is, that all his leaseholds were in Cambridge and none in Suffolk.

Upon the whole of the evidence there is some doubt as to the direction of the lands, and as to the quantity to which the college is entitled; but I entertain no more doubt than his Honor did, that the evidence clearly shows that part at least of what ought to have been given up to the college, has been kept by the lessee. It is to be observed, moreover, that the defendant, or rather those under whom he claims, have, by making a fence, done what has tended, under the circumstances, to aid the confusion of the boundaries.

With regard to the question, whether a commission or an issue be the more expedient course, this is clearly a case for a commis-

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Phillips v. Worth.

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sion. Where the question is one involving a mere positive affirmation on the one hand, or a negation on the other, an issue is the fitter and more convenient course. But where, as in the present case, the object of the inquiry is, to ascertain how \*much of the land has been retained by the de- [\*637] fendant, and in what direction, and if the part retained cannot be exactly ascertained, to determine whether any and what compensation should be made to the plaintiff, the investigation is much more easily and properly conducted by a commission, composed partly of learned persons, and partly of surveyors perambulating upon the spot, than before a jury, amidst the hurry and inaccuracy necessarily incident to a trial at *Nisi Prius*.

If the commissioners should find that only a very trifling portion of land has been retained, of course it would not be a case for compensation: but this conclusion can only be arrived at by accurately ascertaining the metes and bounds; and by such an inquiry the rights of the parties will be adjusted, so that in any event no harm can be done. It might, however, have been a safer and more satisfactory, as it would undoubtedly have been the more regular course, if the words "if any" had been inserted in his Honor's decree, so that no possible injury or injustice might accrue to the defendant, if it should be found that the quantity of land retained was so trifling as not to entitle the plaintiff to compensation.

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\*PHILLIPS v. WORTH.

[\*638]

1831: 16th July.

Where defendants, who had been imprisoned under an attachment which was afterwards set aside for irregularity, commenced actions against the plaintiffs to recover damages for false imprisonment, the court stayed the actions, on the terms of the plaintiffs paying to the defendants their costs at law, and of the application to stay, and directed a reference with respect to a proper compensation for the injury which the defendants had suffered.

MR. PEPPS and Mr. Dixon applied for an order to restrain two of the defendants from prosecuting actions, which they had sever-

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 Mr. Long Wellesley's Case.
 

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ally commenced against the plaintiffs. The actions were brought to recover damages for the injury alleged to have been sustained by imprisonment under an attachment which the court had afterwards set aside on the ground of irregularity.

Sir *E. Sugden* and Mr. *Duckworth* insisted, that on the authority of *Froud v. Lawrence*,<sup>(a)</sup> and on general principles, the plaintiffs were not entitled to the order, unless the defendants were allowed all their costs; and that a reference should be directed to the Master, to inquire and state, whether any and what compensation ought to be made to the defendants, for the injury they had sustained in consequence of their illegal imprisonment.

THE LORD CHANCELLOR directed, that upon the plaintiff's submitting to pay the defendants their costs at law, and also the costs of the present application, the legal proceedings should be stayed; and that it should be referred to the Master, to inquire and state to the court what compensation ought to be made to the defendants respectively, on account of their imprisonment.

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[\*639]      \*WELLESLEY v. THE DUKE OF BEAUFORT.  
                  MR. LONG WELLESLEY'S CASE.

1831: 28th July.

Privilege of Parliament is no protection against an attachment for any contempt which is of a criminal and not of a civil kind.

The clandestine removal of a ward of court from the custody of the person with whom such ward has been residing under the authority of the court, is in its nature a criminal contempt.

A member of the House of Commons, who had carried off his infant daughter, a ward of the court, from the house of the ladies under whose care she had been placed by the guardians appointed by the court, and who on being personally ex-

(a) 1 Jac. & W. 655, *Bailey v. Devereux*, 1 Vern. 269; and see *Ex parte Clarke*, 1 Russ. & Mylne, 563, *Aston v. Heron*, 2 Mylne & Keen, 390.

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admitted by the court admitted the fact, and refused to state the present residence of his daughter, was ordered to be committed to the Fleet, although he was not a party to the suit.

THIS was a motion on behalf of Mr. Long Wellesley, the father of the infant plaintiffs, and now a prisoner in the custody of the serjeant at arms for a contempt, that the order for his commitment might be discharged, on the ground that, as a member of the House of Commons, he was protected from attachment by the privilege of Parliament.

The general nature and object of the suit are stated in Mr. Russell's report of the case of *Wellesley v. The Duke of Beaufort*, upon the question relative to the guardianship of the infant plaintiffs.<sup>(a)</sup> Mr. Long Wellesley was not himself a party to that suit. The particular circumstances out of which the present application arose, are detailed in the order sought to be discharged.

The order in question which bore date the 16th day of July, 1831, recited that by an order of the 9th November, 1825, it was ordered that the Master should approve of a plan for the education and residence of the infant plaintiffs, and that Mr. Long Wellesley their father, should be restrained from interfering with them in their then present situation; that by another order of the 1st of February, 1827, the Master was directed to inquire and report to what persons, other than Mr. Long Wellesley, the custody of his children, the infant plaintiffs, and the care \*of their maintenance and education should be com- [\*640] mitted, and it was ordered that Mr. Long Wellesley should be restrained from removing the said infants, or any of them, from the care or custody of the Misses Long, and that such order had on appeal to the House of Lords been affirmed; that by another order dated the 21st of August, 1829, it was ordered that the custody of the infant plaintiffs, and the care of their maintenance and education, should be committed to the Duchess of Wellington and William Courtenay, Esq., as their guardians,

(a) 2 Russ. 1.

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Mr. Long Wellesley's Case.

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with full discretion as to the course and system of the said infant's education, the persons with whom they should respectively reside, the persons to whom the immediate superintendence of their education should be committed, and the place of their residence. The order went on to state, that the female infant plaintiff was accordingly placed by her said guardians under the care of the Misses Long, her maternal aunts; and it then set out the affidavit of Henry Bicknell, the house steward of the Misses Long, from which it in substance appeared that while the female infant plaintiff was residing with the Misses Long at Unsted Wood, near Godalming, in Surrey, her father Mr. Long Wellesley, accompanied by other persons, came to their residence in the evening of the 15th of July, 1831, and in the absence of the Misses Long conducted the infant plaintiff his daughter to the carriage of the infant plaintiff his eldest son, in which, after some opposition on the part of the Misses Long's servants, he drove off with her, and proceeded to London. The order next recited that, it having been therefore prayed by Sir E. Sugden that Mr. Long Wellesley might be forthwith committed to the Fleet, and the female plaintiff delivered up, it was ordered that the serjeant at arms should instantèr proceed to the residence of Mr.

Long Wellesley, and demand the said infant plaintiff, and [\*641] \*bring her to the bar of the court, and that the rest of the motion should stand over until the return of the serjeant at arms and the attendance of Mr. Long Wellesley in court, either by counsel or in person: and then, after reciting that the serjeant at arms had now returned and informed the Lord Chancellor that he had been to Mr. Long Wellesley's house and had seen him, and that he (Mr. Long Wellesley) had stated that the said female infant was not there, nor should he say where she was, the order proceeded thus—"Whereupon Sir E. Sugden renewing his application for the committal of the said William P. T. Long Wellesley, and the said William P. T. Long Wellesley being now present in court, and admitting that he had read the affidavit above stated, and declining to have time allowed him to answer the same, and being in person examined by the Lord Chancellor on his attestation of honor, the Lord

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Chancellor by special courtesy, waiving to examine him upon oath in the usual manner, and the said William P. T. Long Wellesley, answering upon his honor "that he does not know where the said infant at this moment of time is;" but admitting at the same time that he has removed the said infant from the house of the said Misses Long, as set forth in the said affidavit, and stating that he has given directions to his servants or agents to remove the said infant out of the jurisdiction of this court, and further stating, that he never would bring the said infant again within the jurisdiction of this court—his Lordship does declare the conduct of the said William P. T. Long Wellesley, in removing the said infant plaintiff, as set forth in the said affidavit, and in concealing the present residence of the said infant, to be a contempt of this court; and his Lordship doth further declare the conduct of the said William P. T. Long Wellesley, in forcibly and without consent removing the infant ward of this court, the king's subject, beyond the realm, and his refusal

\*now in person *coram judice* to inform the Lord Chan- [\*842]  
cellor where the said infant is to be found, to be a gross and aggravated contempt of this court; and the said William P. T. Long Wellesley, notwithstanding admonition, still persisting in such his contempt, his Lordship doth order that the said William P. T. Long Wellesley be committed to his Majesty's prison of the Fleet, until he shall clear his contempt, and this court make other order to the contrary."

On the same day that this order was pronounced, the fact of Mr. Wellesley's commitment was brought to the knowledge of the House of Commons by a letter which the Lord Chancellor addressed to the speaker; and two days afterwards a similar communication was made to the speaker by Mr. Wellesley, who submitted that the order was an infringement of the privileges of Parliament, and claimed to be set at liberty by the interposition of the House. The measure was referred by the House of Commons to a committee of privileges. That committee, after hearing evidence for several days with respect to the facts of the

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case, and examining into the precedents on the subject, made their report to the House on the 26th of July, 1831.

The report of the committee, after adverting briefly to the facts of the case, and referring to the evidence, set forth in detail the different precedents which a search into the journals had furnished, touching breaches of privilege by the arrest of members of Parliament, and took notice of the several statutes which had been passed to restrain the privilege of Parliament. It then stated that the committee, after every inquiry, had been unable to find any case, in which the right of the Court of Chancery to commit for contempt, had been enforced against [\*648] persons entitled to privilege of Parliament. The \*cases of Lady Wenman<sup>(a)</sup> and Lord Roscommon,<sup>(b)</sup> which had been mentioned, the committee did not consider to be conclusive; the former being that of an Irish peeress who in the 7 G. 1, was committed for a contempt by the then Lord Chancellor, and was at that time entitled to no privilege in England: while the latter was that of an Irish peer in the 10 G. 4, who under the Act of Union was clearly entitled to a privilege of peerage; but as the order for his commitment for a contempt, though made by the Lord Chancellor, had never been executed or even taken out of the Registrar's office, no opportunity occurred for questioning it in the House of Lords, the only tribunal which could decide on the extent of that privilege. The report then proceeded as follows:

"The case of the Countess of Shaftsbury, 10 G. 1,<sup>(c)</sup> in some respects resembles the present. The court there directed a sequestration, but did not attempt to commit a peeress who had contrived and effected the marriage of her son, an infant of the age of fourteen years, without the consent of his guardian. Your committee, having failed to discover any instance in which a member of either House of Parliament had been imprisoned for a contempt, except by the authority of the House to which he be-

(a) 1 P. Wms. 701.

(c) 2 P. Wms. 169.

(b) Before Lord Lyndhurst, 1830.

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longed, since the early cases above referred to which are imperfectly reported, have proceeded to consider this case on the grounds of analogy and of intrinsic merits.

"The same principle, on which it has been resolved by the House of Lords that privilege shall not prevent the \*courts of law from enforcing obedience to a writ of [\*644] *habeas corpus*, seems to require by analogy that the Lord Chancellor should possess equal powers for the protection of the wards of the crown committed to his charge, and should be enabled to exercise the most prompt and effectual means to prevent them from being withdrawn out of his jurisdiction. The committee find the right of courts of law to commit privileged persons for some highly criminal contempts strongly asserted by different writers, particularly by Blackstone and Hawkins. Attachment for criminal contempt has been described as a judgment and execution, the conviction of an offender by a court of competent jurisdiction, and the award of a sentence for his offence. Your committee, therefore, conceive that the present case falls within the principle under which persons committing indictable offences have been considered not to be entitled to privilege.

' Under all the circumstances of the case, the committee have come to the following resolution; that Mr. Long Wellesley's claim to be discharged from imprisonment by reason of privilege of Parliament, ought not to be admitted."

The motion to discharge the order of the 18th of July, now came on in the Court of Chancery; and Mr. Wellesley's leading counsel, the *Solicitor-General*, having declined to argue the case, after the report of the committee of the House of Commons, his junior, Mr. *Beames*, was heard by the indulgence of the court, as *amicus curiæ*, in support of the application.

It appeared that at the time when the abduction of the infant plaintiff took place, she was, strictly speaking, without any guardians appointed by the court; for the \*Duch- [\*645]



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ess of Wellington had died about three months previously, and no new appointment had been made; and as the office of joint guardian does not survive,<sup>(a)</sup> the guardianship of Mr. Courtenay was also determined. It was, however, assumed throughout the discussion that, as the young lady had been placed under the care of the Misses Long by the authority of the court, and as the order<sup>(b)</sup> by which Mr. Wellesley was restrained from removing her from the care and custody of those ladies was still in force, this accidental circumstance did not affect the question respecting the contempt.

Mr. *Beames*: The proposition which I mean to contend for is, that there is no jurisdiction in this court to commit Mr. Wellesley for a contempt, inasmuch as he is a member of Parliament; and in discussing the question it may be convenient to consider how the matter stands, first, at common law, next upon the statute law, and lastly with reference to the cases in this court.

Innumerable cases occur in the old books, especially the year books, all establishing the position that a member of Parliament is not liable to be arrested or imprisoned save in three cases only; namely, felony, treason, and breach of the peace; but instead of travelling through those cases, it will be sufficient to come at once to the authority of Lord Coke, who, in his fourth Institute,<sup>(c)</sup> takes notice of this as an undoubted privilege of a member of Parliament, and lays down the doctrine in the words already stated, that a member of Parliament cannot be arrested or imprisoned but in the three cases of treason, felony, and [\*646] breach of the peace. \*In that passage Lord Coke adverts to the Court of Chancery, for he expressly says, referring to the case of a subpoena, that the same rule applies to courts of equity; and he observes that the privilege is not confined to the member of Parliament, but extends equally to his servants. Indeed he goes further; for he also says with reference to the goods and chattels of a member of Parliament, that

(a) *Bradshaw v. Bradshaw*, 1 Russ. 528.

(c) 4 Inst. 24, 25.

(b) See this order, 3 Russ. 44.

they are not to be distrained, as he expresses it, "during his privilege."

Lord Coke in a previous part of his work had occasion to consider what is always spoken of as the *lex parliamenti*; and in his first Institute,(a) in enumerating the different laws which prevail, he mentions it by that name. Nor do these passages stand unsupported and alone. They have been recognized in the celebrated case of *Regina v. Paty*,(b) in which, though Lord Holt differed from the other judges on some points, he expressly refers to the passages cited from Lord Coke as establishing that the *lex parliamenti* forms part of the law of this land, and that the privilege of members of Parliament prevails in all but the three cases of treason, felony, and breach of the peace.

The comparatively recent case of John Wilkes, in which under a warrant issued by the Secretary of State, Wilkes was committed to the Tower and afterwards brought up before the Court of Common Pleas, furnishes an illustration of the same general doctrine. In that case, two objections taken to the form of the warrant were overruled by the court; but a third objection, that Wilkes was a member of Parliament, had its effect, and he was accordingly discharged. Lord Camden, who at that time presided in the Court of Common \*Pleas, in giving [\*647] judgment(c) expressly refers to the passage in the fourth Institute; and he lays it down broadly that in every case except treason, felony, and breach of the peace, the privilege prevails; in other words, that courts of law are bound to suspend the exercise of their jurisdiction in every case in which a member of Parliament is concerned, except in the three cases of treason, felony, and breach of the peace.

It may therefore be assumed, without citing a multitude of other cases which were expressly recognized by Lord Holt in *Regina v. Paty*, and which are brought down to modern times by the decision in the case of John Wilkes, that the law corres-

(a) 1 Inst. 11, b.

(b) 2 Raym. 1105.

(c) 2 Wils. 159.

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ponds with the doctrine laid down by Lord Coke. Lord Holt, in delivering judgment in *Regina v. Paty*, very emphatically expressed his opinion with respect to parliamentary privilege; a circumstance the more important because his Lordship does not appear in that judgment to have been by any means favorable to such privilege, as was supposed to exist in that case in favor of members of the House of Commons. His language is, "The privileges of the House of Commons are well known; they are founded on the law of the land; and are nothing but the law:" and he continues, "when a matter of privilege comes in question in Westminster Hall, the judges must determine it. We must take notice of the *lex parliamenti*. Lord Coke, in his first Institute, enumerates it as the law of the land."<sup>(a)</sup>

In another case of frequent reference, *The Executors of Skewys v. Chamond*,<sup>(b)</sup> the question was, whether a member of [\*648] Parliament was privileged from an arrest; and in the discussion that took place, the court pointed out the principles upon which the privilege is grounded. The court considers the attendance of a member of Parliament in his place as of great importance to the state; for the state has an interest in the due discharge of the duties of every member of Parliament in his place in Parliament; and that interest is paramount to every other, and only gives way in the three excepted cases of treason, felony, and breach of the peace. In those particular instances in which the privilege is made to yield to the criminal law, it is a choice of evils; the law probably considering that a person who has committed a crime is not altogether a fit person to be the representative of others, or perhaps that the state itself, could not exist if crime were not to be reached in any individual. But upon whatever notion the exception is founded, it is certainly understood that in those three particular cases, and in no others, the privilege gives way to the law. This subject was much discussed in the case of *Holiday v. Pitt*,<sup>(c)</sup> where ten out of the twelve judges were decidedly in favor of the privilege,

(a) 2 Raym. 1114.

(c) 2 Stra. 985.

(b) 1 Dyer, 504. b.

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and considered that since the statute of William<sup>(a)</sup> there could not be a doubt of its existence. The subject was also considered in an old case of *Hodges v. Moor*,<sup>(b)</sup> where the court was of opinion that the privilege existed in all civil cases. In *Hodges v. Moor* allusion was made to *Thorpe's Case*, in which it was admitted that Parliament, though it did not stay the proceedings of the King's Courts, privileged the persons of its members; and it is well known to be the doctrine of the courts of common law, and acknowledged as such by the writers on the subject, among \*others by Mr. Tidd, that a *capias* on a [\*649] judgment at law cannot be had against a member of Parliament.

Upon these authorities it is submitted that, at common law, the privilege is clear: that all these cases, and innumerable others which might have been cited to the same effect, establish the proposition that there is no jurisdiction in civil matters in any of the courts of law of equity against a member of Parliament, so as to enable a judge to commit him; and that there is jurisdiction in criminal matters in the three cases put of treason, felony, and breach of the peace.

Adverting next to the manner in which the privilege has been dealt with by statutes, it is sufficient to observe of all of them (1 Jac. c. 13; 12 & 13 W. 3, c. 3; 11 G. 24; and 10 G. 3; c. 50), what the whole frame and language of their several provisions evidently show, that they were passed for the purpose not of enlarging, but restricting the common law privilege; and in that light, indeed, the court regarded them in the case already cited of *Holiday v. Pitt*; <sup>(a)</sup> and, farther, that the immunity from arrest of persons entitled to the privilege of Parliament is distinctly recognized and reserved in every one of them. These statutes, too, apply to courts of equity as well as to courts of law; for the enactments refer indiscriminately to suits and actions, and speak of proceedings in courts of equity and in the

(a) 12 &amp; 13 W. 3, c. 3.

(c) 2 Stra. 985.

(b) Noy. 83; Latch. 48, 150.

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Court of Chancery, in such a manner as to prove that no distinction was contemplated or supposed to exist between legal and equitable proceedings in this respect.

The cases in equity upon the subject are not so numerous as at law. But all the books of practice concur \*in [\*650] laying down the proposition that, in the case of a peer or member of Parliament, the person cannot be touched. The court, however, has not left the party aggrieved altogether without a remedy, but it has given him a remedy of a different and peculiar kind; it does not permit him to impound, so to speak, the person of a refractory member of Parliament, but it enables him to compel obedience to the decree of the court by means of a sequestration.

The high authority of Chief Baron Gilbert distinctly recognizes this doctrine in his *Forum Romanum*,<sup>(a)</sup> where he states the practice as applicable to a peer and member of parliament to be by sequestration. The general orders of this court make some curious distinctions upon the subject of beating the person serving the process of this court; how far the contempt is sufficiently evidenced by one witness, in what cases the evidence of two is required, and other similar questions, which Gilbert discusses elaborately;<sup>(b)</sup> and in the course of his discussion he puts the case of a peer *abusing* (which is a very high contempt of this court) the officer who serves its process; and in that particular instance he says the peer cannot be committed. The words of Gilbert, which are general and may apply either to opprobrious language or to personal violence, are as follows: "But a nobleman or peer of this realm may abuse the party who serves the process upon him, *toties quoties*, for his person being sacred, the court cannot come at him as they do in the case of a commoner, *quod est durum*." If that, however, be the law, the hardship cannot affect the question. In another passage, putting the case of ● breach of decree, he says, that for breaking a decree, [\*651] or non-appearance, or want of an \*answer, you may se-

(a) Page 67.

(b) *For. Rom.* 212.

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quester the real and personal estate of the party, as is used and practised where the defendant is a peer of this realm; but shall not arrest or imprison the body of any of the knights, citizens, or burgesses, or other privileged persons, during the continuance of privilege of Parliament.

In the older Chancery Reports, there are a few authorities, not perhaps very explicit, but still amounting to a recognition of the rule in equity, that the person of a member of Parliament cannot be touched, except in treason, felony, and breach of the peace. Of these one of the earliest is an anonymous case<sup>(a)</sup> in the year 1676, which lays it down broadly that the widows of peers are exempt from arrest. The inference is that as they were exempt, their husbands must have been exempt likewise. The marginal note of *Pury v. Juxon*,<sup>(b)</sup> a case in the year 1689, states that a member of convocation had the same privilege as a member of Parliament, without specifying what that was; an acknowledgment, however, that there was some privilege enjoyed by the latter. In the year 1686<sup>(c)</sup> a motion was made before Lord Keeper Bridgman against a member of Parliament for an injunction for want of an answer; the injunction was granted, but the court ordered that an attachment should not be entered against the defendant, he being a member of Parliament. In the year 1685<sup>(d)</sup> it was laid down, that the court will not proceed against a member that has privilege of Parliament, yet if he sue at law the court will enjoin him until he answer.

These cases establish the proposition that, as against a member of Parliament, the old practice of the court \*was [\*652] never to issue any process which touched the person.

The next is a case frequently referred to, *Eyre v. The Countess of Shaftsbury*,<sup>(a)</sup> in which a sequestration was issued against the Countess of Shaftsbury. The offence of that lady was of a

(a) 2 Ch. Ca. 224.

(b) Ch. Rep. 38.

(c) Ch. Rep. 12.

(d) Anon. 1 Vern. 329.

(a) 2 P. Wms. 102; Galb. Eq. Rep. 172.

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much higher nature than the offence of Mr. Wellesley. Mr. Wellesley, it may be assumed, is in a situation to put himself *rectus in curia*, by restoring his daughter to the court; and when he has restored her, he will have cleared his contempt, and will be no longer considered a fit object of punishment. But the Countess of Shaftsbury never could restore the parties to their original condition. She had committed one of the gravest offences which a person can commit against a court of equity. She had actually married, or connived at, or assisted in, or procured the marriage of a ward of court. She was, therefore, in a situation infinitely more penal, so to speak, than Mr. Wellesley; because, whatever submission she might make, she was no longer capable of undoing the mischief she had done. Yet, even in that state of circumstances, the court did not commit her, but was satisfied with merely issuing a sequestration. Recourse was had to the common and ordinary mode of proceeding against a peer, that of sequestrating the property—sequestrating it of course as a punishment only, for there was nothing further for the countess to do. The sequestration could not possibly be used there, as it might be used most beneficially in the present instance, in order to prevent a mischief, and to restore the parties to the same situation in which they were before the particular offence was committed. The object, therefore, was simply punishment; and although there was every motive for punishing Lady [\*658] Shaftsbury \*with the utmost severity, that the example might strike terror into the minds of others, and deter them from the commission of a similar offence, the court never attempted to commit her person, but contented itself with sequestrating her property. That case is reported by Chief Baron Gilbert, as well as by Peere Williams, and the reports differ in no essential respect, except as to the case of *Annesley v. Annesley*, to which they both refer. From the statement of Peere Williams the inference would be, that Lord Annesley was committed; but from Gilbert's report it is plain that the fact was otherwise, and that the court had only recourse to its usual proceeding of a sequestration; and there also it must have been inflicted in the way of punishment. It may be remarked, too,



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that Lord Macclesfield, who decided *Lady Shaftsbury's Case*, was a judge on all occasions disposed not only to exercise his jurisdiction, but to carry it to its utmost verge; for he conceived that the jurisdiction was most salutary, and that its usefulness was only to be proved by his exercising it rigorously and effectively.

The proceedings in *Ex parte Hopkins*(a) were subsequent to *Lady Shaftsbury's Case*, and after Lord Macclesfield had presided in this court for a considerable period. In that case, a merchant had left his fortune, which was considerable, to two nieces, whom he had brought up in his house, and he appointed certain persons to be his executors. The nieces were living with one of the executors, a relation of the name of Hopkins; and the father, who was a very poor man, and who probably thought his paternal power might in that instance be very usefully exerted, for the purpose of \*getting a sum of [\*654] money to induce him to suspend it, became, or represented that he was anxious to obtain possession of his children, and to remove them from the executor, in whose custody they were. Lord Macclesfield felt very great doubt whether he could entertain the question upon petition; but he so far acknowledged the paternal power as to say—and it is with that view the case is referred to—that the father was justified in taking his daughters how he could, having an undoubted right to the guardianship of them, provided he did not commit an actual breach of the peace in such an attempt.

It may, perhaps, be said that in the present case a breach of the peace was committed; but after the opinion intimated by the court, that the exception with respect to privilege, as laid down by Lord Coke, has reference only to such breaches of the peace as may become the subject of legal proceedings before a tribunal which can regularly take cognizance of them, it is needless to pursue that topic farther. A fourth head of argument might have been found in the decisions of the House of Commons itself, upon questions where its own privileges have been con-

(a) 3 P. Wms. 158.



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cerned, and as to which it has always reserved to itself a right to judge; but after the recent resolution of the committee in this very case, it becomes unnecessary to enter upon that discussion.

THE LORD CHANCELLOR:—If a court of law or of equity, upon due deliberation, entertains an opinion that a member of either House of Parliament has privilege of Parliament, that court is, in my judgment, bound to give him the benefit of his privilege, and to give it him with all its incidents, even [\*655] \*although the House to which he belongs abandons it as a claim of right; for a court knows nothing judicially of what takes place in Parliament till what is there done becomes an Act of the Legislature.

Mr. *Beames*: The only other point to be adverted to relates to the contempt itself. Considering the subject in the abstract, and laying the particular facts entirely out of view, the first observation is that the court makes no distinction between civil contempts, if I may so express myself, and criminal contempts. The court makes a considerable distinction between what are, in its own language, termed aggravated contempts, and those not of an aggravated description. In the case of a party setting the power of the court at defiance, and refusing to do an act of justice, which he has been required to do, to his opponent, which is an aggravated contempt, the court has gone a great length. Even in the time of Lord Bacon, as the orders show, the court has put the party so acting into strict confinement. And there is a case in *Tothil* where that confinement appears to have been of a very severe nature.

Nothing, however, can be found in the orders of the court to justify a distinction between civil and criminal contempts. Indeed the very exposition which to-day has been given of the rule, as laid down by Lord Coke, would render it impossible, consistently with that doctrine, to make any difference between them, or to hold that, without the intervention of a jury, without that fair mode of trial which a person charged in a criminal

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sense is legally entitled to, a party, possibly a very poor and helpless individual, may be exposed to a contest single-handed against all the powers of the Great Seal.

\*The only distinction taken, has been between simple [\*656] disobedience and disobedience of an aggravated kind; and the court attaches terms and a penalty to the latter, which it does not do to the former. But the object in every case is the same—to effect a compliance with the orders of the court; and when that object has been attained, on payment of costs, and submitting himself to the power of the court, the party is generally set at liberty. This is illustrated by the course adopted in the instance of a person marrying a ward of court. The officer is there sent to take the party into custody: the party is committed; but the moment the settlement is signed, he is set at liberty on paying the costs. The court, therefore, uses the power of committing for a contempt, not as a means of punishing a criminal act, but only for the purpose of enforcing obedience to its rules, orders, and decrees.

THE LORD CHANCELLOR:—I am exceedingly well pleased that I took the course which I saw fit to take, and which I thought the interests of justice prescribed, without any deviation from the strictest rules in force here, as well as in all other courts, with respect to the hearing of counsel. In conformity with those rules I suffered Mr. *Beames* to address the court as *amicus curiæ*, upon a question so grave in itself and so nearly touching the liberty of the subject. This practice has been frequently adopted in matters resembling the subject of the present discussion. It is not unusual in the Court of King's Bench, which, in the exercise of its high criminal jurisdiction, is wont to let in the light to be obtained from such arguments, that a failure of justice may be prevented.

I am the better satisfied with having taken that course in this case, because Mr. *Beames* has, in an exemplary manner, \*abstained from abusing the indulgence which I gave [\*657]

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him. He has confined himself most rigidly to the question which he endeavored to illustrate; he has abstained from all that did not come strictly within the scope of that permission; he has stated the argument with his usual distinctness and acuteness, and with very great succinctness indeed, considering the extent of the field over which he had to travel, and the variety of learning, more or less bearing on the subject, which he must have gone through in his own researches. In a word, he has exercised the delicate office of *amicus curiæ* with great correctness and precision.

If, upon hearing Mr. *Beames*, I had found he threw any new light upon the question, which may now be said to be under consideration after a fortnight's discussion, elsewhere as well as here; if he had imported into the consideration of it any fresh authorities, or any hitherto uncited cases, I should undoubtedly have paused to give the party, on whose behalf substantially he has addressed me, the benefit even of possibilities and doubts. But it is no disparagement of Mr. *Beames'* learning or industry to say that he has failed to bring novelty into a discussion of so long standing that it may well be termed *vezata*: that he has failed to add anything new, only because such an addition would inevitably have been departing from the matter which was appropriate to the discussion; only because it had been exhausted by his predecessors, and because no man could hope to be original in it without also being erroneous.

Therefore, although leaning, as I ought to do, towards the gentleman on whose behalf it has been attempted to raise a doubt, I yet feel no obligation on my part to delay the expression of my opinion upon the legal and constitutional point now made.

[\*658]      \*The old authorities upon the subject of parliamentary privilege are to be taken with very ample allowance, for they all refer to times, and exist in circumstances, wherein the claim of privilege by members of Parliament was

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infinitely larger than anything upon which both houses now are content to rest. One can hardly open a book under the head of parliamentary privilege without being satisfied of the truth of this proposition. In the very volume of Peere Williams, from which the *Shaftsbury Case* has been quoted, it is laid down in *Lord Clifford's Case*(a) that the first process against a peer of the realm, or against a person having privilege of the lower House as a knight of the shire, or as a citizen or burgess, is sequestration. But in another case(b) in the same book, without a name and equally without authority in these days, it is stated that the same exemption extends to the menial servants of peers; and that the first process in their case also for any contempt of court (for no exception is made), is not by arrest of the body but by sequestration. This, too, was so ruled after the statute of William(c) in restraint of privilege; and the right must indeed have existed after that Act, if the privilege ever existed in those menial servants, just as it did before the Act; for the statute saves the rights of all persons then having privilege, and makes no difference in its enactments between the case of the master and that of the servant.(d)

To bring authorities either from the records of Parliament, or indeed from the records of courts in times when privilege was so much larger than is now contended or even thought of by the stoutest champion of \*parliamentary rights—so [\*659] much more extensive that it might be said to be a different, rather than the same claim—is manifestly of no use in disposing of the practical question now before us.

But if any one wishes to see how far the pretensions of the Houses of Parliament have formerly been carried, to know how incumbent it is upon the courts of law to defend their high and sacred duty of guarding the lives, the liberties and the properties of the subject, and protecting the respectability and the very existence of the Houses of Parliament themselves, against wild and

(a) 2 P. Wms. 385.

(c) 12 &amp; 13 W. 3, c. 2.

(b) Anon. 1 P. Wms. 535.

(d) See 10 G. 3, c. 50.

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extravagant, and groundless, and inconsistent notions of privilege, it would be sufficient to refer, not to the times of the Plantagenets, of the Tudors, or of the Stuarts, the records of which abound in extravagant *dicta* of the courts, and yet more extravagant pretensions of the two Houses, but to a much later and more rational period of parliamentary history—to the days of the family under whom happily all classes in these realms have so long enjoyed, each in its sphere, the rights of freemen.

In the year 1759, an action of trespass for breaking and entering a fishery was tried in the House of Commons, to the lasting opprobrium of parliamentary privilege, to the scandal and disgrace of the House of Parliament that tried it, and to the astonishment and alarm of all good men, whether lawyers or laymen. Admiral Griffin made complaint to the House whereof he was a member, that three men, whose names were stated, had broken into and entered his fishery near Plymouth, had taken the fish therefrom, and destroyed the nets therein; and the House forthwith, instead of indignantly and in mockery of such a pretension dismissing the charge and censuring him who made it, ordered the defendants in the trespass, for so they must [\*660] be called, to be \*committed into the custody of the serjeant at arms. They were committed into that custody accordingly; they were brought to the bar of the House of Commons, and there, on their knees, they confessed their fault; they promised never again to offend the admiral by interfering with his alleged right of fishery; and upon this confession and promise they were discharged on paying their fees. So that by way of privilege, a trespass was actually tried by the plaintiff himself sitting in judgment against his adversary the defendant, and the judge (for in this case the House and the complaining party must be considered as identical), was pleased to decide in his own favor.(a)

This is enough to warn courts of justice how they accede to claims of privilege the instant they hear that once magical word

(a) Commons' Journals, vol. xxviii. pp. 489, 550. The journals of that period abound with cases of a similar kind. See 2 Mylne & Keen, 395.

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pronounced. Even in the event of the House of Parliament, by their committee's report and by their votes, having decided in favor of so monstrous a pretension, I should still have deemed it my duty, if the facts of the case authorized me, to act as I am now prepared to act, or rather to continue acting. If, instead of justly, temperately and wisely abandoning this monstrous claim, I had found an unanimous resolution of the House in its favor, I should still (and it was this which made me interpose to assure the counsel that I needed not the resolution of the House of Commons in favor of the Court of Chancery), I should still have steadily pursued my own course, and persisted in acting according to what I knew to be the law.

Having disposed, generally speaking, of the authorities of those early days by these observations, I must, however, remark further that I can find no cases in the [\*661] books to justify the assertion of privilege now made. I speak not of the records of Parliament, but confine my proposition to judicial authority. This distinction I feel myself, after mature deliberation, authorized and bound to take. For let not any one imagine that when I at once and without argument ordered Mr. Wellesley to be committed to the Fleet, well knowing at the time that he was a member of the House of Commons, I was taken unprepared, or expressed a rash or unadvised opinion. The case was familiar to my mind. I had seen it in every form; I had heard it discussed in every shape; I had seen it in the court of Parliament; I had encountered it in the courts of law. In all those courts I had borne a share in the discussion; having myself argued the greatest of all the cases<sup>(a)</sup> when it came by writ of error from the courts of King's Bench and Exchequer Chamber before the highest judicature of the realm, the House of Lords, sitting as a court of law. The result of that deliberation and attention has been confirmed in my mind by more recent inquiry, and by again going over the ground I had so often previously trodden; and the conclusion I have come to is,

(a) *Burdett v. Abbot*, *Burdett v. Colman*, 5 Dow, 165.

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that there is no ground whatever to maintain the claim of privilege now set up.

To those who argue on the other side I at once make a present of almost all that Mr. Beames urged this morning, as to commitments for refusing to put in an answer, for refusing to pay money ordered to be paid, for resisting a decree to perform any specific act, for cutting down timber,<sup>(a)</sup> or doing any other act [\*662] in the \*face of an injunction, and in the face of any other order of this court. The breach of any order substantially of a civil description, and in a civil matter, that is, a matter touching the rights of real or personal property, will not entitle this court, the Court of King's Bench, the Common Bench, the Exchequer of the King, nay, not even the House of Lords itself, judging in the last resort, to attach the person of the party having privilege of Parliament, and disobeying such an order.

I leave for further observation that ingenious and acute part of Mr. *Beame's* argument where he takes the ground of denying the distinction between a civil and a criminal contempt; the only part of his argument in which I think he may be said to have thrown any new light upon the subject. I had, however, previously considered the question in this point of view; I had frequently heard it discussed, in the course of the former controversies; and it was not, therefore, now presented to my mind in this light for the first time.

Accordingly the ground on which I rest my denial of parliamentary privilege in the present case is not that taken by my Lord Coke, and by the oftentimes repeated resolutions of the House of Commons—the proposition which makes the exception, but confines it to treason, felony and surety of the peace, and

(a) In *Shirley v. Earl Ferrers*, Lincoln's Inn Hall, July 15, 1831, the Lord Chancellor affirmed an order by which it was directed that a sequestration should issue against the defendant, Earl Ferrers, for cutting down timber in breach of an injunction, and that an agent of his Lordship, who had been a party to the same contempt, should be committed to the Fleet.

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maintains privilege in every other case. I have already, in the course of the argument, stated one reason why I cannot so restrict the privilege—why I draw my line in another direction, or higher up upon the scale. If the only ground of commitment, by a court of competent jurisdiction to try the case, was that a breach of the peace had been \*committed, the breach [\*663] of the peace not being the main offence, but only incidental to it, and accidentally mixed up with it—if that were the only ground, no court could commit for a contempt unaccompanied by a breach of the peace, however aggravated the criminality of that contempt might have been. And a second consequence would also follow, that this or any other court which had not jurisdiction of a breach of the peace could not commit at all. A justice of the peace could commit, the Court of King's Bench could commit; but the Court of Chancery, the Common Bench, or the Exchequer, could not commit, because they have no jurisdiction, no cognizance of the peace.

There are, however, many offences—and this is the other ground of my denying that to be the right distinction—offences for which no man can doubt the right of the courts of Common Pleas, of Exchequer and of Chancery, to commit; offences for which till now their right to commit has never been disputed; offences involving no breach of the peace, and for which, by every day's practice, parties are committed by those courts, and by the Court of King's Bench, not sitting as a criminal court.

If the line is to be assumed which has been drawn by Lord Coke in the first Institute, and followed by the Houses of Parliament without, as it appears to me, duly weighing the subject matter, will it be said that a member of Parliament can commit perjury without punishment? That is no treason, or felony, or breach of the peace: it is not even such an offence as for which you can have "surety of the peace," the expression used in some of the parliamentary resolutions.

It may be said, indeed, that a member of Parliament is liable to an indictment for perjury in any court that has



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[\*664] \*competent jurisdiction, and will, on conviction, be punished in his person by imprisonment. But upon this two material observations arise: First, if breach of the peace, treason and felony, alone give to any court a right to take the body of a person having privilege of Parliament, where is that qualification of Lord Coke's rule, or of the resolutions of the Commons, to be found, which entitles a court after trial and conviction to touch the person of the privileged man? From the beginning to the end of the parliamentary discussions on the subject, there is no distinction taken between mesne process and the execution of a sentence. And yet, if the limit of the rule of privilege is to be taken from the text of Lord Coke, or from the resolutions of the Houses of Parliament, no member of Parliament could be imprisoned even upon a conviction for perjury by virtue of a judicial sentence legally pronounced. But the second observation renders the accuracy of the first immaterial. What shall be said of a crime nearly equal to perjury as to its effects in defeating the ends of justice, a crime which, though not in a technical sense equal, is yet in all other respects the same with perjury, I mean prevarication upon oath? If the prevarication amounts to all that moral perjury can reach, either in mischief or in guilt, if a man has twenty times over in his cross-examination told a falsehood, and his next breath has operated his own conviction of that falsehood, unless it be upon a point material to the issue to be tried, it is not perjury in law. What do the courts, when that foul crime is committed in their face? They do not order the party to be indicted for perjury, as he would be if he had sworn falsely to a thing material to the issue—because they know that he must then escape upon a trial; but they order him to stand committed for his prevarication. In what form, and under what name? *For a contempt of the court by prevaricating on his oath.* If in the Court of King's Bench a member of

[\*665] Parliament \*should so far forget his honor as a representative, and his duty as a man, as to prevaricate grossly on his oath, was it ever dreamt he would be at liberty to say, "true, I have prevaricated; but I am a knight of the shire, I am a citizen, or I am a burgess in Parliament: true, it is, I have done

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that which degrades and disgraces me, that which is the most flagrant attempt that can be made to defeat the administration of justice; true, it is, I have done that for committing which any other man would have been hurried from hence to a dungeon; but I am a member of the House of Commons; I have privilege of Parliament, and my person is as sacred as the oath which I have taken and broken." Were any man so ill advised as to offer such an insult to the court, far from operating to his protection under this privilege, it is my firm belief, it is my fervent hope, that it would make him cease to be a member of Parliament by expulsion. But it is also my belief that it would, in the first instance, be visited with condign punishment by the court whose dignity had been outraged; and that, long before the House which he had disgraced had thrust him forth, the court would vindicate its insulted honor, and reject with scorn the plea of privilege by which he had aggravated his offence.

The line, then, which I draw is this; that against all civil process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not: that he who has privilege of Parliament, in all civil matters, matters which whatever be the form are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege; that members of Parliament are privileged against commitment, *qua* process, to \*compel [\*666] them to do an act; against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance; that in all such matters members of Parliament are protected; but that they are no more protected than the rest of the king's subjects from commitment in execution of a sentence, where the sentence is that of a court of competent jurisdiction, and has been duly and regularly pronounced. Now convictions, and the sentences that follow upon them, are of two sorts; either formally, upon trial,

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by indictment or information and verdict, with the consequent judgment, or summarily, but as legally, as formally, by a commitment for contempt, where there is no other punishment provided, and no other mode of trying the offence.

In the case of the Earl of Shaftsbury<sup>(a)</sup> who, when committed by the Lords' House of Parliament, whereof he was a member, brought his writ of *habeas corpus*, Lord Chief Justice Rainsford in delivering the judgment of the court, held that the court had no right to consider the validity or the form of the warrant upon which the earl had been committed. It was enough for that court that a contempt was alleged, and an order of commitment made upon which the warrant proceeded; and the Chief Justice observed that if a party guilty of contempt could not be committed to prison, there was then no punishment at all with which he could be visited for his offence.

So, if the party here guilty of the contempt cannot be [\*667] committed to prison, he must escape punishment \*altogether; for a breach of the peace is not necessarily incident to the contempt. And yet I should have committed just as much, had there been no breach of the peace, as if the offence of contemning the court had been aggravated by the additional offence of an assault committed upon one of his Majesty's subjects.

There are cases indeed which go a good deal further, and which justify me in denying that what, in common parlance, may be called criminal contempt, must have been committed in order to oust the privilege. If the contempt savors of criminality, and the sentence is penal, that according to the books appears to be enough.

With respect to the distinction between civil and criminal contempts, denied by Mr. *Beames*, I agree that there may oftentimes be a difficulty in finding, first, authority for deciding where the line is to be drawn, and, secondly, instances in practice for drawing it. Yet that line has been recognized by the Court of

(a) 6 State Trials, p. 1269, How. ed.

King's Bench, in *Catmur v. Knatchbull*,<sup>(a)</sup> and in *Walker v. Lord Grosvenor*.<sup>(b)</sup> The former was the case of non-performance of an award, made a rule of court; for non-performance, being a disobedience, was a contempt of the court, and so might be regarded as technically speaking and in form an offence. But the court held that as it related simply to a civil matter, and was rather in the nature of process to compel the performance of a specific act, the matter was in substance not criminal but civil; and it refused to commit the defendant, a member of Parliament, for his disobedience. The same doctrine was laid down in the other case, where the non-compliance was by a peer.

\*But suppose the matter to have been criminal, though [\*668] without breach of the peace; suppose, for instance, an interruption or obstruction of the court's business by a man, having privilege of Parliament, getting up and stopping the court by a long harangue, by ribaldry, by invective, by slander, or by any other indecency which human wit may fancy, or human folly may practice, is it possible to doubt that the court would order its officer to seize him forthwith and remove and commit him to confinement, as a person who, in the face of the court, had been guilty of a contempt, of a criminal, and not of a civil kind?<sup>(c)</sup> Indeed if he was merely removed from the court, that would be enough for the purpose of my argument; because the act of the officer, and, consequently of the court itself—the bare act of taking the offender and putting him out of court is as much imprisonment, in contemplation of law, as if he had been thrown into the King's Bench prison. And if the party is privileged from being sent to prison, he is equally privileged from being turned out of court. Yet if the judges had not this power, about 1,100 men would have the right to go and interrupt the business of all the courts in the kingdom. The business of licensing ses-

(a) 7 T. R. 448.

(b) 7 T. R. 171.

(c) A peer refusing to be sworn is guilty of a contempt for which he may be committed and fined. 2 Salk. 278. "No peer or lord of Parliament hath privilege of peerage or of Parliament against being compelled by process of the courts in Westminster Hall to pay obedience to a writ of *habeas corpus* directed to him." *Lords' Journals*, vol. xxix. p. 37, *Re v. Earl Ferrers*, 1 Burr. 631.

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sions and of quarter sessions in the country might be entirely put a stop to by one or two gentlemen in the county, who might happen to take an interest in obstructing the proceedings, and to be clothed with parliamentary privilege.

But it is not there only that such interruptions may take place. If these privileged individuals choose to carry [\*669] \*their political interference so far, the very business of the Court of Hustings and of the sheriff at elections, where they are not merely supposed but are almost assumed to take a deep interest, may be put an end to; so that, until we come to Parliament itself, we should here have upwards of a thousand persons who would have the absolute right, uncontrolled by any power save that of the Houses to which they belong, of entering individually or in a body, into those courts, and not only obstructing all election, but interrupting the administration of all civil and criminal justice.

Nor is the argument *ab inconvenienti* less applicable to equitable jurisdiction than it is to the other branches of judicature. Who are the persons most likely to be guilty of those very offences which this court is most frequently called upon to visit with punishment in order to protect its wards? If other courts have a certain proportion of their suitors in Parliament, this court, from the importance of the matters brought before it, has a much larger proportion there; and if there be any cases in which members of Parliament—young commoners, and young lords—are more likely than others to become obnoxious to our jurisdiction, it is precisely in cases relating to the safety of heir-esses and other wards.(a)

(a) That interfering with the custody, or secretly encouraging or abetting the marriage of a ward of court, has always been regarded as a contempt in its nature criminal, and punishable as such by commitment during pleasure, see *Phipps v. Earl of Anglesea*, 1 P. Wms. 696, and *Kiffen v. Kiffen*, and *Dr. Yalden's Case* there cited; *Herbert's Case*, 3 P. Wms. 116; *More v. More*, 2 Atk. 157; *Anon. (Hughes v. Science)*, 2 Atk. 173; *Smith v. Smith*, 3 Atk. 305; *Buller v. Freeman*, Amb. 301, and the cases referred to in Mr. Blunt's notes; *Brandon v. Knight*, 1 Dick. 160; *Stevens v. Savage*, 1 Ves. jun. 154; *Priestley v. Lamb*, 6 Ves. 421; *Millet v. Rouse*, 7 Ves. 419; *Bathurst v. Murray*, 8 Ves. 74; *Warton v. Yorke*, 19 Ves. 451. In the Practical

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\*That case may still be supposed in real life which in [\*670] the most finished part of the most excellent of his works, the poet has so admirably described in the history of a travelled and accomplished profligate, of whom, when in the depth of his desperate fortunes,

"Stolen from a duel, followed by a nun,"

it is added, as the means of retrieving him—

"But if a borough choose him, not undone."

And such are the men whom this arrogated privilege would suffer to enter within the precincts of this high court of judicature, and to revel in the contempt of the most delicate, the most important of the functions with which it is intrusted.

I have already given a reason why the authority of decided cases in favor of privilege goes for little, if drawn from times when the most extravagant notions of its extent were entertained; but in the same proportion must any decision against privilege in those times be held so much the stronger in behalf of the law's authority. I will only refer to a case in Levinz which seems to me directly in point—a case never contradicted, never overruled, and calculated by decision to make an end of the argument. I allude to the case of *Wilkinson v. Boulton*, before the Court of King's Bench, when Lord Hale presided, and reported by Mr. J. Levinz.<sup>(a)</sup> To an action for false imprisonment there was pleaded a justification,\*under the [\*671] custom of London for the mayor and aldermen to have the custody and guardianship of female orphans till twenty-one or marriage, and for any persons taking such from the guardian appointed by the mayor and aldermen, to be brought up before the court and imprisoned. To this plea there was a demurrer on

Register (p. 134, Wyatt's ed.) a distinction is taken between direct and positive contempts, for which the party may be punished by being committed to the Fleet during pleasure, and ordinary contempts, where the commitment is only till the order of the court be obeyed.

(a) 1 Lev. 162.

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two grounds, the first of which is only material in so far as it drew from the court a declaration that the matter was criminal for which the party had been imprisoned. The second ground was that the custom as alleged was ill, "because it is a custom to commit without exception of peers." This demurrer therefore raised the question distinctly, whether or not a peer could be committed for such contempt of the court of aldermen as consisted in taking an orphan out of the custody by them appointed; and the court held it clear that a "peer is not privileged in this case"—I cite the book—"for in *homine replegiando*, where he detains the body, he shall be committed;" and there was judgment for the defendant, disallowing the demurrer. The authorities cited by the court are the year book 11 H. 4, 15, and Fitzherbert's *Natura Brevium*, 68, C. The former was a case of *homine replegiando*, in which the sheriff had returned that the distress had been eloigned; and one point made was, that the party was a peer of the realm, "*issint que capias ne gist pas vera lui*." But the court took the distinction I have pursued here, and said "*en dett et trespas capias ne gist my vers un Count Baron et hujusmodi; per ceo que pur cause de lour estate, il est entend que ils ont assets, &c.; mes en cest case le tort que el fait, de ce que el ne souffre le replevin estre fait, est le cause que son corps sera pris, de quel estate que il soit;*" and reference is made to *Redman's Case*, in the time of King Richard. The language of Fitzherbert(a) [\*672] is equally precise; \*"If there be," says that writer "an eloignment returned by the sheriff, the plaintiff shall have a *capias in withernam* to take the defendant's body, and to keep the same *quousque*, &c., whether he be a peer of the realm or other common person."

But I am content to rely on the case itself, decided by Lord Hale, and in the same age to which we owe the *Habeas Corpus* Act. It is a case peculiarly in point with the present. The authority with which privilege of peerage was assumed by the demurrer to come in conflict, was that of a city court: the con-

(a) N. B. 155, C.

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tempt for which it was alleged that privileged persons could not be arrested was taking away a ward of that court. The Court of King's Bench held that the peerage and its privileges afforded no protection in such a case; and to make the authority more applicable, the court illustrated the decision by referring to the writ of *homine replegiando*, against which, if a peer was refractory, it was held to be clear that he must be committed; that is, if he eloiigned the body of the villein or person sought to be replevied. Now Mr. Long Wellesley has here taken away and detained the ward of this court; he has eloiigned that ward. Is it saying too much to add that a privilege which could not protect a peer in the time of Charles II. against the authority of the mayor's court, is still less capable in the present day of protecting a commoner against the authority of the Great Seal?

I have therefore the sanction of *Wilkinson v. Boulton*; I have the authority of the year book in the time of Henry IV.; I have the great authority of Fitzherbert, that a peer of the realm as well as any other person shall be committed for obstruction, and contempt in the \*nature of obstruction to [\*673] the process of the king's courts. You will find moreover that the Star Chamber—I refer to the authority of the Star Chamber reluctantly, but it was a regular court, and one little likely to err against privilege—that that court committed a peer of the realm. The peer had disputed its authority; he was committed for an offence in the nature of a contempt, and by a process such as we should use to compel the performance of an act.

Upon the authority, therefore, of all these cases; upon the authority, still higher in my own judgment, of the principle, and upon the reason of the whole matter, the absolute necessity of applying the laws equally to all classes, and the intolerable nuisance which would be suffered were 1,000 or 1,100 persons to exist in this country placed by privilege of Parliament above the law, and enabled to defy the jurisdiction of all the king's courts—upon all these grounds, I have no doubt whatever that the



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distinction here is soundly taken—not the distinction laid down by Lord Coke of treason, felony, and breach of the peace on the one side, and offences on the other, where no treason, felony, or breach of the peace has been committed—a distinction inconsistent with itself, fruitful of bad consequences, and incapable of being pursued through the authorities; and that the true grounds upon which to rest the case are these two: first, that privilege never extends to protect from punishment, though it may extend to protect from civil process; and, next, that privilege never extends to protect even from civil process where the object of the process is the delivery up of a person wrongfully detained by a party. All the principle, all the authorities, all the reasoning are in favor of this ground, and it is upon this, and [\*674] this ground only, that \*the jurisdiction of all the courts can safely and securely rest.(a)

(a) The following case, extracted from the Registrar's book, was furnished to the Lord Chancellor by Mr. Seton.

## MARTIN'S CASE.

L. C., 8th August, 1747.

A person writing a letter to the Lord Chancellor, relative to a threatened suit, and inclosing a bank note, was held guilty of a contempt, and ordered to attend personally and show cause why he should not be committed; but afterwards, on his appearing and expressing contrition, he was discharged on payment of costs.

THE Right Honorable the Lord High Chancellor of Great Britain this day taking notice in open court that his Lordship, on the 2d of this instant August, had received a letter by the general post, directed to the Right Honorable the Chancellor of England, dated Yarmouth, in Norfolk, 1st August, 1747, signed Thomas Martin, making mention of a bill in Chancery threatened to be filed against the said Thomas Martin, and relating to the subject matter of such suit, and inclosing a bank note for 20*l*, which he thereby desired his Lordship's acceptance of; and the said letter and bank note, and also the affidavit of J. H., proving the said letter to be the proper handwriting of the said Thomas Martin, being read; this court, upon taking the said matter into consideration, deeming the contents of the said letter and the sending thereof, with such bank bill inclosed therein, unto his Lordship, to be a great misbehavior in the said Thomas Martin, and a contempt of this court, doth think fit to order that the said Thomas Martin, having personal notice hereof, do show cause unto this court, the first general seal after Michaelmas next, why he should not stand committed to the prison of the Fleet for the said contempt and misbehavior, and that he do then personally attend this court; and that the said letter and bank note of 20*l* be deposited in the hands of the Registrar, subject to the further order of this court. Reg. Lib. B. 1746, fol. 406.

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## FURTHER ORDER.

L. C., 13th November, 1747.

This court doth decree that, in consideration of the said Thomas Martin's submission to the court, and asking pardon for his offence, and of his being now mayor of \*the corporation of Great Yarmouth, and that the commitment of [\*675] him to the prison of the Fleet might be a prejudice to the public business and affairs of the corporation, the court doth not think fit to order him to be committed, he consenting, by Mr. H., his clerk in court, to pay the costs of the order made for him to show cause why he should not stand committed, and of the execution and service thereof, and that the bank note for 20*l.* which has been left in the hands of the Registrar be applied and distributed for the relief of such of the poor prisoners in the Fleet prison as are the most proper objects of charity; and doth order that the said bank note be delivered by the Registrar to the warden of the Fleet for that purpose, on the behalf of Thomas Martin. Reg. Lib. B. 1747, fol. 34.

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 COLLARD v. HARE.

BOLLE—1831; 5th May.

A testatrix devised a customary tenement to John, without words limiting the inheritance. Upon her death, the dormant surrenderee, in whom the legal estate was, surrendered the fee to John; and John died more than forty years before the filing of the bill, having surrendered the tenement to a purchaser, who had notice of the will of the testatrix: Held, that the equitable title of the heir, which accrued on the death of John, was barred by length of time.

THE bill stated that William Collard, being at the time of his death seised in fee simple of certain customary messuages or tenements, holden of the manor of Taunton Deane, died many years ago, leaving Elizabeth Collard, his widow, and customary heiress according to the custom of the manor; that, upon his decease, Elizabeth Collard entered into possession of the said messuages or tenements, lands and hereditaments, or into the receipt of the rents and profits thereof, as such customary heiress, and continued in such possession or receipt till the time of her death; that the lands holden of the manor of Taunton Deane are customary freehold of inheritance, and, by the custom of the manor, are not \*devisable unless the tenant or [\*676] owner makes, in his lifetime, a dormant surrender to the use of a dormant surrenderee or trustee upon the trusts of the will of the surrenderor; that, when a tenant of any lands

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holden of the manor dies, his customary heir, or (if he has made a dormant surrender) the dormant surrenderee is required, by the custom of the manor, within three court days after the death of the tenant, to make an entry in the court of the lord of the manor, or before his steward, the making of which entry is or amounts to an admittance, and vests the legal estate of the lands in such customary heir or in such dormant surrenderee or trustee; and in case an entry is not made within three court days, the lands become liable to be forfeited to the lord for a time, and are said to fall into lockage (which is a temporary forfeiture), and when the lands are in lockage the lord of the manor is, by the custom, bound, at any time afterwards, upon the payment of a treble fine to regrant the same to the customary heir of the tenant who was last seised thereof, or if such tenant made a dormant surrender, then to the dormant surrenderee or trustee named therein or his customary heir: that Elizabeth Collard neglected to make the requisite entry after the death of her husband, whereby the said messuages or tenements fell into lockage: that Elizabeth Collard by her will, bearing date the 20th day of December, 1777, after reciting that she had by her dormant surrender, surrendered all her lands in the manor of Taunton Deane unto George Skuse and George Townsend, and to the survivor of them, and to the heirs of such survivor, subject to her last will and testament, devised as follows: "Also I give unto my son, John Collard, all that messuage or tenement and gardens with their appurtenances, situate in Eastreetch in Taunton St. Mary Magdalen, late in the possession of Madam Roberts; and all that messuage or tenement and gardens situate in Northtown, in [\*677] the parish of \*Taunton St. James, with their appurtenances, late in the possession of Mr. Thomas Burch, both of them part of the manor of Taunton Deane; all the rest, money and residue of my goods, chattels, rights, and credits whatsoever and wheresoever, I give and bequeath unto my said son John Collard;" that Elizabeth Collard died shortly afterwards, leaving William Collard her youngest son and customary heir, and also the customary heir of her late husband William Collard, according to the custom of the manor; that, on or about the 11th day of Oc-

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tober, 1779, the lord of the manor granted the customary premises comprised in Elizabeth Collard's will, out of lockage, to the said George Townsend, his heirs and assigns for ever, as the surviving surrenderee named in the dormant surrender made by the said Elizabeth Collard; that George Townsend was thereupon admitted and became seised of the legal estate of and in the said premises, upon the trusts of the will: that, under these trusts, John Collard became entitled in equity to the premises for the term of his life, and subject to such life estate, William Collard, the youngest son and customary heir, became entitled in equity to the same: that on the 12th of October, 1779, George Townsend surrendered the premises into the hands of the lord of the manor, to the use of John Collard, his heirs and assigns forever, according to the custom of the manor, and he was accordingly admitted: that, in the year 1782, John Collard surrendered the same premises to the use of Hugh Payne and Betty Collard, their heirs and assigns: that they were admitted thereto, and, in the year 1785, surrendered the same premises to the use of George Hare, his heirs and assigns: that George Hare was admitted, and, upon his death, the defendant Thomas Hare, being his customary heir, was admitted tenant, and had ever since been in the receipt of the rents and profits of the lands; that the plaintiff was the customary heir both of his grandfather William Collard, and of his father William \*Collard, and of his [\*678] mother Mary Collard, and of his grandmother, the testatrix Elizabeth Collard; that John Collard died several years ago, and, upon his death, William Collard the plaintiff's father, if then living, and if not, Mary Collard, and upon her decease, the plaintiff, as such customary heir, became entitled to the customary premises in question.

The bill, after stating that the defendant alleged that Hugh Payne, Betty Collard, and George Hare purchased the premises for full valuable consideration and without notice of the plaintiff's title, charged that the several persons under whom the defendant claimed the premises, had notice, before or at the times when the same were surrendered or assured to them, "of

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the matters aforesaid, and particularly of the will of Elizabeth Collard, and of the premises having belonged to her and being held under her will;" and it further charged that "the legal estate in the premises became vested in George Townsend as a trustee upon the before-mentioned trusts, and that John Collard, Hugh Payne, Betty Collard, George Hare, and the defendant Thomas Hare, respectively, became seised of the legal estate in the premises under and by virtue of the surrender made by George Townsend; and that they held, and the defendant continued to hold the legal estate upon and subject to the same trusts upon which George Townsend held the same, and that the defendant was a trustee for the plaintiff." The prayer was, that the defendant might be declared a trustee of the premises for the plaintiff and decreed to surrender them to him.

The answer stated that "dormant surrenderees are not considered to be and are not in fact trustees, but that dormant surrenderees, when the surrenderor dies intestate, take, both at law and in equity, according to the custom of the said manor, [\*679] the absolute beneficial ownership, \*estate, right, and title in fee, according to the custom of the said manor, of and in the premises surrendered, or such parts thereof and such estates therein, of which the surrenderor dies intestate, without any trust for the customary heir of the surrenderor." On this ground the defendant insisted, that, even if the will of Elizabeth Collard gave her son John only a life estate in the premises, the inheritance of the equitable estate did not descend to the customary heir, but belonged to Townsend, and passed from him, by his surrender, to those in whose favor that surrender was made. The defendant also stated, that, "Hugh Payne and Betty Collard having become entitled adversely as against the plaintiff and those under whom he claimed, and having good right to convey and surrender such premises, for a valuable consideration, they, on or about the 19th of May, 1785, did surrender the said premises to the use of George Hare, his heirs and assigns;" and he insisted "that he had obtained good title against the claim of the plaintiff to the said premises by the adverse possession of

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himself and his predecessors in estate, for a period of forty years and upwards, without notice of the plaintiff's claim." He said further, "that he did not know and could not set forth, as to his remembrance, information, or belief, whether the several parties, under whom he claimed title to the premises, or any or either of them, before or at the times when the same were surrendered, or assured to them respectively, were or were not, was or was not aware, or had or had not notice of the matters in the bill alleged, or any or either of them, or of the will of Elizabeth Collard, or of the premises having belonged to Elizabeth Collard, and being held under such will." John Collard, he said, was dead many years ago; but he did not know when he died.

The plaintiff proved his title as alleged in the bill; and the documents showed that those, under whom the defendant \*claimed, had notice of the will of Elizabeth Collard. The defendant proved that John Collard died about fifty years ago. [\*680]

Mr. *Bickersteth* and Mr. *Jacob*, for the plaintiff.

As the devise to John Collard in the will of Elizabeth does not contain any words of limitation, he took only an equitable estate for his own life; subject to which estate the equitable fee descended to the customary heir, and was transmitted to the plaintiff by the death of his father and mother. Townsend had the legal fee; and being a trustee of it for John during his life, with remainder to those through whom the plaintiff claims, he made a surrender to John Collard in fee. It was the duty of Townsend to take care of the interests of all the *cestuis que trust*; and, the surrender by him being made without consideration, and to a party who had no claim except under Elizabeth's will, John necessarily took the legal fee clothed with the same trusts on which Townsend had held it. Hugh Payne, Betty Collard, and Geore Hare had notice of Elizabeth's will; and they must be held, therefore, to have been successively trustees, and the defendant must be held to be now a trustee, for the party right-

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fully entitled. The doctrine of *Cholmondeley v. Clinton*(a) does not apply; for there the legal estate was outstanding; and the party, who had acquired the alleged adverse possession, and sought to protect himself by it, had not gotten it by any breach of trust, and had not been placed at any time in the situation of a trustee. In *Cholmondeley v. Clinton*(a), Lord Eldon observes, "In the case of a strict trustee, it was his duty to take care of the interest of his *cestui que trust*, and he was not permitted to do anything adverse to it; a tenant also had a duty to preserve the interests of his landlord; and many acts therefore of a [681] trustee and a tenant, \*which, if done by a stranger would be acts of adverse possession, would not be so in them, from its being their duty to abstain from them." The plaintiff has therefore a clear title; and length of time is not in this case any bar to the relief he prays.

Besides, a defendant in order to protect himself by length of time as a bar, must by his answer insist on the benefit of it by clear and unequivocal words. As the Statute of Limitations must be insisted on in due form, either by plea or answer, so this defence, which is admitted in equity only by analogy to the statute, must be raised in due form. Here the answer insists, not that the defendant is protected by length of time, but that he has obtained good title by adverse possession for more than forty years, without notice of the plaintiff's title; and so little did he deem length of time a defence, that he says he does not know when John Collard died, though it was only from the time of John Collard's death that adverse possession could run.

Mr. Pemberton, *contra*.

Any title, which the plaintiff may have, accrued in possession on the death of John Collard, which took place more than forty years ago; and the question is, can he now have the assistance of this court to give effect to his alleged equitable right. If the legal estate had continued outstanding in Townsend or any other

(a) 2 Jac. & Walk. 190.

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person, it is admitted that the rule established in *Cholmondeley v Clinton* would apply; and is a party to be in a worse situation, because he has clothed his adverse possession with the legal title? The parties, who purchased from John Collard, believed that he was the owner of the estate; and under that belief they took a conveyance from him. If they can be affected with notice of an equitable title in the plaintiff, that does not render them trustees for him; it only gives an adverse equitable right, and he is \*bound to enforce that right within twenty- [\*682] one years. The objection of length of time is sufficiently raised in the answer; and even if it were not, the defendant has a right to the benefit of it, if the facts disclosed in evidence bring the case within the rule.

THE MASTER OF THE ROLLS :—Elizabeth Collard being seised of certain customary freeholds, parcel of the manor of Taunton Deane, made a dormant surrender thereof, according to the custom of the manor, to two trustees and their heirs, subject to her will and testament; and afterwards by her will she made a devise in favor of her son John Collard in terms, which, it was contended, gave him only an estate for life. After the death of Elizabeth Collard, the surviving trustee in the dormant surrender, considering that John Collard took a fee under his mother's will, on the 12th of October, 1779, surrendered the customary tenements to the use of John Collard, his heirs and assigns.

On the 7th of September, 1782, John Collard sold the customary tenements to Hugh Payne and Betty Collard, and surrendered the same to them and their heirs; and the defendant in the suit was in possession under a subsequent sale made by those purchasers to an ancestor of the defendant in the suit. The plaintiff claimed as equitable owner under Elizabeth Collard's will, upon the ground that John Collard took only a life estate under that will, and prayed a surrender of the legal estate from the defendant. The time of the death of John Collard was not distinctly in evidence, but it was admitted that he had been dead upwards of forty years before the filing of the bill.



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The defendant relying upon the objection arising from the length of time; did not argue the question whether, upon the true construction of Elizabeth Collard's will, John Collard did take an estate for life or in fee.

[\*688] \*The plaintiff insisted that John Collard was tenant for life only; and that in respect of the fee which he took under the surrender of the surviving trustee of the will, inasmuch as he was affected with notice of the will, he was a trustee for the uses of the will; that the defendant claiming under that surrender was also affected with notice, and equally a trustee for the uses of the will; and that a trustee could not avail himself of length of time against his *cestui que trust*.

From the death of John Collard, which is admitted to have taken place upwards of forty years before the filing of the bill, the possession was plainly adverse to the title of the defendant; and the House of Lords has decided that this court will not relieve after an adverse possession of twenty years. The defendant may be considered as affected with notice of Elizabeth Collard's will; and if the plaintiff had claimed within the twenty years, there would have been an equity against the defendant, which is now barred by length of time. But the relation of trustee and *cestui que trust* does not exist between these parties in the sense in which Lord Eldon has used the expression.

Bill dismissed with costs.

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IN THE MATTER OF PIGOTT.

1831: 30th July.

Proper form of the reference under the 1 W. 4, c. 60.

THE Lord Chancellor stated, in relation to this and several other petitions which had been presented under the Act 1 W. 4. c. 60., for enabling persons of unsound mind, but not found

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lunatic by inquisition, to convey property vested in them by way of trust or mortgage, that the reference under that Act ought in future to comprise the following points :

\*First. An inquiry whether the alleged trustee or [\*684] mortgagee was an idiot, lunatic, or of unsound mind, or incapable of managing his affairs ; and if so,

Secondly. Whether he was seised or possessed of the estate or hereditaments and premises in the petition mentioned, or of any and what parts thereof, either alone or jointly with any other and what persons, as a trustee or trustees, upon any and what trusts, or by way of any and what mortgage and for whom, within the meaning of the Act ;

Thirdly. Whether the alleged lunatic trustee or mortgagee took any and what beneficial interest therein ;

Fourthly. Whether there was any and what power or authority under the deed or instrument by virtue of which the alleged lunatic became a trustee or mortgagee, to appoint a new trustee or trustees ; and if not, then

Fifthly. A direction to inquire and certify who was a proper person or persons to be appointed such new trustee or trustees in the room of — ; and also

Sixthly. To appoint a proper person to convey to such new trustee or trustees.

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Cochrane v. Cochrane.

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## COCHRANE v. COCHRANE.

1831: 9th August.

Biddings opened on an advance of 500*l*. upon 13,500*l*., under the circumstances.

MR. KOE, on behalf of a purchaser, moved to discharge an order of the Vice Chancellor permitting biddings to be opened. The estate had been sold for 13,500*l*. upon which an advance of 500*l*. was offered \*by a person who was [\*685] present at the sale. The order, it was contended by Mr. Koe, went further than any precedent warranted. The proposed advance was less than four per cent. upon the purchase-money; and as this was a common administration suit, and not a contest among creditors seeking payment out of a deficient fund, the court ought not to go beyond the ordinary rule, and, for the supposed benefit of individuals, parties in the cause, extend a practice which was prejudicial to suitors generally, and which Lord Eldon had frequently censured and regretted.

Mr. *Kindersley* opposed the motion, and cited *Lefroy v. Lefroy*(a) as an authority for his Honor's order. In such cases the court had regard principally to the interests of the parties who would be entitled to the proceeds of the sale; and here all those parties were desirous that the biddings should be opened.

THE LORD CHANCELLOR, after looking at the affidavits and the particulars of sale, observed that the purchase appeared to him to be a very advantageous one. Besides the value of the timber, the lands yielded a clear rental of more than 400*l*. a year, paid by substantial tenants; and the leases were granted at a period when the lands were not likely to be let too high. It was not improbable that the estate might bring considerably more upon a re-sale than had yet been offered. He should therefore affirm the order, but without costs, as this was said to be the first instance of biddings being opened on an advance of less than four per cent.(b)

(a) 2 Russ. 606.

(b) *Lawrence v. Halliday*, 6 Sim. 296.

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Dell v. Barlow.

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\*DELL v. BARLOW.

[\*686]

1831: 22d March.

The deposit on an appeal is merely a security for costs: and, therefore, where an appeal is dismissed without costs, the deposit will be returned, unless the court makes special order to the contrary.

AN order was made in this cause dismissing the appeal without costs, but nothing was said in the order respecting the deposit.

Mr. *Koe* now applied on behalf of the appellant, to have the deposit returned. The deposit, he submitted, was merely intended as a security for the costs, in case they should be given against the party who appealed.

Mr. *Combe, contra*, relied on the forty-second of the new orders, by which it is provided "that the deposit upon every petition of appeal or re-hearing, be increased to 20*l.*, to be paid to the adverse party when the decree or order appealed from is not varied in any material point, together with the further taxed costs occasioned by the appeal or re-hearing, unless the court shall otherwise order." The subject had been before the Chancery Commissioners; and they had introduced into their report a recommendation which it seemed to be the object of the forty-second order to carry into effect. Mr. *Combe* also referred to the order of Lord Loughborough, and the construction which it had uniformly received in practice.

THE LORD CHANCELLOR said he considered the deposit to be in the nature of a security for costs; and that for the purpose of putting a sensible construction on the forty-second order, he must read the words "unless the court shall otherwise order" as governing all the preceding clauses of the sentence, and applicable to the deposit as well as to the costs. To adopt the \*other construction, would in truth be to impose a [\*687] penalty of 20*l.* upon an appeal. Consistently with his

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Hood v. Wilson.

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judgment in this case that no costs were to be given to either party, he should, therefore, as a matter of course, direct the deposit to be returned.

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His Lordship acted on the same principle in *Portman v. Mill*, 18th March, 1831, and in several other cases, in which he affirmed the decree of the court below without costs.

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## HOOO v. WILSON.

1831: 15th July.

Costs, as between solicitor and client, will be allowed to the plaintiff in a creditors' suit, where there is a deficient fund.

THIS was the bill of a creditor, suing on behalf of himself and other creditors, and praying the administration of the assets of a deceased debtor. The fund had proved insufficient to satisfy all the debts.

Sir *E. Sugden* asked for the costs of the plaintiff, as between solicitor and client. He stated that where a bill was filed for the general benefit of creditors or legatees, and the estate proved deficient, the court had been of late years in the habit of giving the plaintiff his costs of the suit as between solicitor and client. This rule had been adopted by Lord Lyndhurst in *Turner v. Turner*; and it had also been recently sanctioned by the present Master of the Rolls,<sup>(a)</sup> and the Vice-Chancellor.<sup>(b)</sup>

[\*688] \*Mr. *Agar*, *contra*, denied that any such general practice had been established, whatever might have been done in particular cases. Lord Eldon, though repeatedly applied to for that purpose, had uniformly refused to lay down such a rule.

(a) *Chisnum v. Dewes*, 5 Russ. 29; *Rowlands v. Tucker*, vol. i. p. 635, *supra*.

(b) *Total v. Spicer*, 4 Sim. 510.

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Ogle v. Brandling.

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THE LORD CHANCELLOR said he saw no reason why he should depart from what appeared to be the rule adopted in the other branches of the court, and he therefore gave the plaintiff his full costs.(a)

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## OGLE v. BRANDLING.

1831: 21st July.

The consent of both parties is not necessary to a private hearing.

MR. JACOB stated that this case related to the custody of a young lady who was a ward of the court, and that some of the disclosures made in the affidavits were of so distressing a kind as to render it in his opinion a proper case to be heard in private.

Mr. *Ellison* and Mr. *Mathews* said that, on behalf of their client, they could not consent to a private hearing: there was nothing which, in their judgment, made such a course necessary, and they were anxious to have the matter heard and disposed of at once.

THE LORD CHANCELLOR said he would direct the case to be heard in private, notwithstanding that one of the parties \*withheld his consent; he would act on that as on [\*689] other similar occasions upon the responsibility of the counsel, who gave him the assurance that a private hearing was proper.

The case was accordingly heard in the private room.

THE LORD CHANCELLOR subsequently followed the same course in several other instances.(b)

(a) The rule appears to be now well established, provided there is a deficient fund. See in addition to the cases referred to, *Larkins v. Paxton*, 2 Mylne & Keen, 320; *Brodie v. Bolton*, 3 Mylne & Keen, 168.

(b) See in the *Matter of Lord Portsmouth*, Coop. 106.

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Boys v. Williams.

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## BOYS v. WILLIAMS.

1831: 30th July.

A testatrix by a codicil gave to A. and M. "50*l*. each of bank long annuities, now standing in my name." At the date of the codicil and at her death, she possessed long annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted; and on the effect of that evidence, and the language of the testamentary papers, taken together, the bequests to A. and M. were held not to be specific, but pecuniary.

THE will of Elizabeth Shields bearing date the 9th of December, 1817, after devising her freehold messuages and premises to divers persons therein named, proceeded as follows: "I give unto the nephews and nieces of my late husband 300*l*. stock, 5*l*. per cent. navy annuities, to be divided among them in equal shares and proportions. I also give to my cousins Elizabeth Brown, Charlotte Richardson and Thomas Richards, 200*l*. stock, each, 5*l*. per cent. navy annuities. I also give to my relations Jonathan King and Sarah his wife, 200*l*. stock 5*l*. per cent. navy annuities; and to my relations David Shore and his brother Samuel 100*l*. each of the like stock." The will then gave legacies of sums of 4*l*. per cent. stock to various individuals and charities, to the amount in all of 1,300*l*. of that stock.

[\*690] \*The testatrix subsequently made a codicil dated the 6th of April, 1818, which contained the following passage: "Whereas I have, since the executing of my last will and testament, exchanged my 5*l*. per cent. navy, and 4*l*. per cent. Bank of England stocks, into the Bank of England long annuities stock; I do by these presents declare my will to be that all legacies in my will shall be paid out of my present stock, that is to say, the legacies in the five per cents. navy, and four per cents. shall be paid by the same amount in the long annuities, 5*l*. per annum for 100*l*. five per cents., and 4*l*. per annum for 100*l*. four per cents., and in the same proportion for less sums."

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Another codicil, of the 8th of May, 1821 (in the pleadings called the third codicil), made some alterations in the disposition of the real property devised by the will, and concluded in these words; "I likewise give unto Amelia Shields Boys and Mary Boys, daughters of Thomas and Mary Boys, 50*l.* each, of bank long annuities stock, now standing in my name."

A memorandum, dated the 27th of July, 1827, and also proved as a testamentary paper contained the following passage; "The estate left to Charlotte Richardson to go to Samuel Shore, baker, of Turnham Green, and 100*l.* bank five per cent. annuities; to the children of the late Thomas Richards, of Isleworth, 10*l.* per annum out of the same stock, to be divided share and share alike; to my servant Elizabeth Chandler the sum of 5*l.* a year for her natural life, out of the same stock. The testatrix died on the 8th of September, 1828.

The question in the cause was, whether the bequests to the plaintiffs, Amelia S. Boys and Mary Boys were specific \*legacies of 50*l.* of the testatrix's stock in the long annuities, or legacies of 50*l.* sterling charged upon that stock. [\*691]

At the hearing of the cause before the Vice-Chancellor, the depositions of Peter Fenn, a clerk in the Bank of England, and also of a broker, who spoke to the nature, amount and market value of the stock standing in the bank in the testatrix's name, at the several times of the execution of her will and third codicil, and of her death, were tendered in evidence, to show that the legacies in question to Amelia S. Boys and Mary Boys were not specific but pecuniary.

His Honor rejected these depositions as inadmissible, and decided that the legacies were gifts of so much stock in the long annuities;(a) and the defendants thereupon appealed.

(a) 3 Sim. 563, where the testamentary papers and the purport of the depositions are very fully stated.



Sir *E. Sugden* and Mr. *Richards*, for the appeal, said it would be convenient in the first place to have the question determined whether his Honor was right in rejecting the depositions. They submitted that inasmuch as the evidence was offered only to aid the construction of words which were in themselves equivocal, and not to control or do violence to the meaning of the will, it ought to have been admitted. "Bank long annuities stock" was not a correct designation of any existing species of government stock. The court in forming its judgment, had a right to whatever assistance could be derived from being placed, as it were, in the chair of the testatrix, and knowing with respect to the state of her property, all the facts which she must [\*692] have \*known and had present to her mind at the time when she sat down to dispose of it; *Fonnereau v. Poyntz*, (a) *Selwood v. Mildmay*, (b) *Colpoys v. Colpoys*, (c) *Lowe v. Lord Huntingtower*. (d) In the *Attorney-General v. Grote*, (e) a case very similar to this, where the evidence had been rejected, Lord Eldon on appeal afterwards admitted it; and upon the effect of that evidence he reversed the decision of Sir W. Grant, and cut down legacies, which had been held upon the words to be legacies of so much stock, to mere money legacies. (g)

Mr. *Pepys* and Mr. *Kindersley*, *contra*, contended that there was no ambiguity apparent on the face of the will; and it was only the introduction of evidence, as to the state of the testatrix's property that could create the smallest doubt or uncertainty on the subject. The bequest was of "50*l.* each of bank long annuities stock now standing in my name." The expression "bank long annuities stock" might not be technically accurate, but the meaning was not the less certain. Nothing indeed could be more clear or specific; and it was impossible to hold that evidence, showing that the testatrix probably intended something different from what she had in so many words said, namely, to

(a) 1 Bro. C. C. 472.

(b) 3 Ves. 306.

(c) Jac. 451.

(d) 4 Russ. 532, n.

(e) 3 Mer. 316.

(g) See a note of Lord Eldon's judgment, p. 699, *infra*.

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*Boys v. Williams.*

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give 50*l.* of the bank long annuities there described, was not tendered for the purpose of controlling and doing violence to the plain import of the words. For the purpose of aiding construction, the court had no right to look at extrinsic evidence as to the state of the property at all; *Roper on Legacies*.(a) The decision of Lord Thurlow in *Fonnereau v. Poyntz* had been \*frequently disapproved of; but even if its authority [\*693] were undisputed, it was a case of very peculiar circumstances, the language being equivocal and hardly intelligible, unless reference was had to the explanation afforded by the evidence. Besides, in that case, as well as in *Selwood v. Mildmay*, a latent ambiguity was caused by the fact, that upon the words as they stood, there was no fund in existence to answer the legacies. That was not so, however, in the present instance; for the testatrix when she made her will, and also on the day of her death, had an amount of long annuities, standing in her name, more than sufficient to satisfy the specific legacies in question. In *Colpoys v. Colpoys* and in the *Attorney-General v. Grote*, inaccurate and equivocal expressions were used, which could only be explained and reconciled by referring to matter *dehors* the will.

THE LORD CHANCELLOR said that upon the question of the admissibility of the evidence, he should not trouble counsel to reply, as he entertained no doubt whatever that there had been a miscarriage in that part of the Vice-Chancellor's judgment. To the proposition, that because the words of the will were clear upon the face of them, extrinsic evidence was inadmissible, it was wholly impossible to accede; that being the case of a latent ambiguity, the very case which, according to all the text writers, formed the exception to the general rule against admitting parol evidence to explain or construe the words of the instrument. It was because the ambiguity was not patent, but latent, that is to say, discoverable only upon reference to the subject matter upon which the will purported to operate, that the court was justified in resorting to extrinsic evidence at all. It was per-

(a) Vol. I. p. 270.

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[\*694] feclty true that the court was not at liberty \*in the case of any written instrument, whether a will of real or personal estate, or a deed, to introduce into the consideration of the question of construction, any matter furnished by extrinsic evidence for the purpose of giving a different meaning to the words from that which their plain import conveyed. The court was not at liberty by matter of fact to overrule the construction, which was matter of law, arising on the face of the instrument itself. But that proposition was perfectly consistent with the admission of evidence to explain, though not to control the language, to aid though not to vary or alter the construction.

His Lordship then entered into a review of the authorities which had been cited; and said that the present was, in his opinion, a case in which parol testimony might be admitted in accordance with the principles laid down in former decisions, and especially in *Fonnereau v. Poyntz*; that principle being, that wherever the ambiguity was latent, and was only brought to light upon inquiring into matters and circumstances *dehors* the will, for the purpose of carrying its provisions into effect, the uncertainty might be removed by evidence of the same kind as that by which it had been created. It was impossible to point out any substantial distinction between *Fonnereau v. Poyntz* and this case; and, although *Fonnereau v. Poyntz* was certainly very incorrectly reported, and therefore sometimes misunderstood and carpied at, so far from having been overruled, it had been recognized by Lord Alvanley and Lord Eldon; and it had also more recently been referred to with apparent approbation in the very elaborate opinion delivered by Mr. J. Bayley in the great

[\*695] case of *Doe v. Lord \*Jersey(a)* in the House of Lords. The decision of Sir W. Grant, in *The Attorney-General v. Grote*, might, perhaps, have created some doubt with respect to the principle; but that decision had been reversed by Lord Eldon, and could no longer be considered as an authority. Upon these grounds he was clearly of opinion that the evidence tendered must be admitted.

(a) 2 Brod. & Bing. 551.

The depositions were then read, from which it appeared that on the 9th of December, 1817, when the testatrix made her will, she possessed 1,560*l.* navy five per cents. and 1,400*l.* four per cents. standing in her name, and no other sum of bank annuities or government stock: that on the 8th May, 1821, the date of the third codicil, she possessed the sum of 154*l.* per annum long annuities standing in her name, being of the value of 2,887*l.* 10*s.* at the market price of the day, but no other sum of bank annuities or government stock: and that on the 8th of September, 1828, the day of her death, she possessed the sum of 176*l.* per annum long annuities standing in her name, being of the value of 3,542*l.*, at the market price of the day, and no other sum of bank annuities or government stock.

Sir *E. Sugden* and Mr. *Richards* then submitted, that upon the whole context of these testamentary papers, especially when considered in connection with the state of the testatrix's funded property, as it was now disclosed to the court by the depositions, the testatrix must have necessarily meant to give to the Misses Boys a sum of 50*l.* sterling each, out of her long annuities, that being the only stock of any description which she then possessed, to answer all the numerous legacies which by \*the codicil of the 6th of April, 1818, were expressly [\*696] charged upon that stock. Upon any other construction the codicil of the 8th of May, 1821, would operate as an almost total revocation of the will.

Mr. *Pepys* and Mr. *Kindersley*, on the other side, contended that the evidence as to the state and value of the testatrix's funded property did not carry the appellants' case further than the words of the will and codicil had done. That was the opinion expressed by his Honor in the court below. If the legacies to the Misses Boys were specific (and that they were so upon the terms of the gift it was impossible to deny), all that remained for the court to do was to inquire whether, at the time of the testatrix's death, she possessed a fund to answer them specifically; and to that extent, and for that purpose only was

the parol evidence now to be received; *Innes v. Johnson*.<sup>(a)</sup> The amount or value of the fund at other times, or with reference to other claims which might possibly be made on it, especially if those claims were merely pecuniary, was immaterial; the court in putting its construction upon the language of bequests which were in form specific, having no right to enter into such considerations; *Kirby v. Potter*,<sup>(b)</sup> *Norris v. Harrison*.<sup>(c)</sup> Would it be maintained that if the testatrix had subsequently to the date of her third codicil sold all her long annuities, these two legacies would have been good as a charge on any other stock she might have purchased with the proceeds? In all the cases in which evidence as to the state and value of the property had been admitted, the bequest was general, of so much of a particular stock belonging to the testator, and not, as here, of so much of a particular stock described as then standing in his [\*697] name; and in all of them, \*moreover, there had been so much variation and incorrectness in the language in which the different legacies alleged to be specific were given, that upon the face of the will itself, a reasonable doubt as to the meaning was raised.

THE LORD CHANCELLOR:—The court is now called upon to put a construction upon these testamentary papers, with the aid of all the light to be gained from the knowledge which the testatrix was herself possessed of with respect to her funded property, and which must be presumed to have influenced and guided her at the time when she proceeded to dispose of it. It is vain to say that the evidence shall be let in for one purpose, namely, to show that these legacies must be specific, because there is a fund to answer them, and that it shall not also be received for the purpose of showing the amount and value of the fund, with a view to the decision of that same question. The cases of *Selwood v. Mildmay*, and *Fonnereau v. Poyntz*, point at no such distinction or restriction; and no such restriction has been suggested by Lord Eldon in *The Attorney-General v. Grote*.<sup>(d)</sup> If the evidence

(a) 4 Ves. 568.

(c) 2 Mad. 268.

(b) 4 Ves. 748.

(d) Page 699, *infra*.

as to the state and value of the property is to be admitted for one purpose, it must be admitted for all; the principle being, that in order the better to come to a correct conclusion on the whole of the testamentary dispositions, the court has a right to the assistance to be derived from being placed as much as possible in the position of the testator, so as to see with his eyes and understand his feelings at the time when he exercised his disposing power; and having now the benefit of that assistance, I am clearly of opinion that these must be considered as mere pecuniary legacies, intended to be charged upon the stock in question.

\*It was said with truth that when the legacies are [\*698] specific, it is a matter of no importance to ascertain what was the value of the fund either at the time of the testator's death or at the date of the will; for all that would result from a deficiency of the fund would be that some parties would go unpaid. But the very question here is, whether the legacies are specific or not; and in determining that question, the court is clearly called upon to look at the state and amount of the testatrix's property with reference to the provisions contained in the whole of the testamentary papers, and will not lightly assume that she has given legacies without any intention that they should inure for the benefit of the legatees. The court always leans, where without violence to the words, and in fairness, it can do so, towards such a construction as will make the whole will effectual, rather than to a construction which would render one half or two thirds of its provisions utterly inoperative.

Now I desire to know in what respect this case differs from the others in which evidence of the state and value of the property has been received in aid of the construction? It is said that here the probability that these legacies were intended to be pecuniary is not so great as it was in those cases; and it is further said, that the words designating the subject matter of the gift are stronger and more specific than in them; but I confess I see no substantial distinction between "—I. in long annuities to be transferred by my executors to the legatees," the expression used in *Fonnereau v. Poyntz*, and "50l each bank long an-

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Attorney-General v. Grote.

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nuities stock now standing in my name," the expression with which I have here to deal. In both cases equally the testatrix appears to me to be plainly dealing with her own fund, and that a fund which she conceived she then had in her possession. The same observation appears to have occurred to [\*699] \*Lord Eldon in *The Attorney-General v. Grote*, with respect to the expression "further part of my stock," as indicating an impression on the mind of the testatrix that she was dealing with stock which she then actually had. That expression appears to me to be quite as strong in favor of holding the legacy there given to be specific, as any words which are to be found in this will. Nevertheless Lord Eldon, upon the effect of that expression, considered in connection with the rest of the will, and as elucidated by the evidence with respect to the state and value of the property, determined that the legacies of so much of the testatrix's long annuities stock were to be construed as mere money legacies charged upon that stock.

Any intimation which his Honor may have thrown out, as to what his opinion might have been if the evidence were admitted, must have been entirely extra-judicial.

Judgment reversed.

Reg. Lib. A. 1830. fol. 2956.

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ATTORNEY-GENERAL v. GROTE.(a)

1827:

Legacy of "100l long annuities stock" held, upon the context of the will and the terms of the gift as compared with those of the other bequests, and upon the evidence of the state of the funded property, to be pecuniary and not specific.

THIS case(b) was argued on appeal before Lord Eldon, who had not pronounced judgment at the time when he resigned the Great Seal; but the following written opinion was afterwards

(a) See the preceding case.

(b) Reported in 3 Mer. 316.

delivered out by his Lordship, the parties having consented to accept it as his judgment :

\*“I have very frequently given my attention to this [\*700] case, and I have no hesitation in stating that I have often changed my opinion upon it. To say that I have never been able, to my own satisfaction, to reconcile the decisions to be found in the books upon cases which involve similar questions, is only to repeat what I have often stated in court. The difficulties in this case are *probably* considerably increased by the judge's being obliged to take the will and codicil as they are to be found in the probate, although it is very possible that their contents, when the testatrix made them, might influence the construction of such parts as must now be taken to be the whole of the will and codicil.”

“I think there is evidence upon the face of the will that the testatrix meant the legacies which she connects with the word ‘stock’ to be legacies of stock which she had. She uses the expression ‘further parts of *my* stock;’ and where the testatrix uses the expression ‘*my* stock,’ I conceive she means to give what she has.

“The question is whether, where she gives 100*l.* long annuities stock, she means the same as if she had given 100*l.* per annum long annuities. It is difficult to get rid of a strong impression which the repeated variations of the terms ‘gifts of —*l.* per annum bank long annuities,’ and of the terms ‘100*l.* long annuities stock,’ to be found in this will, create in the mind of a person reading the will. It is difficult to conceive that the testatrix really meant the same thing in both cases. But individual belief ought not to govern the case; it must be judicial persuasion.

“Parol evidence, if there were any, of what the testatrix meant, will not do. In *Stafford v. Horton*,<sup>(a)</sup> as I under-

(a) 1 Bro. C. C. 482.



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Attorney-General v. Grote.

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[\*701] stand \*it, parol evidence, or what could only have been proved by parol declarations, was held not to be admissible to control the words of the will. After frequently changing my opinion upon the present case, as I apprehend evidence of the state of the funded property of the testatrix may be resorted to, I have come to the conclusion that there is enough in the terms of the gift and the state of the property, taken together, to authorize a court in saying that the 100*l.* were not to be 100*l.* per annum, but so much stock as would be sufficient to pay 100*l.* Those terms and that state, taken together, seem to me to authorize this construction of the legacies, as reasonably as any words in *Fonnereau v. Poyntz* authorized a limited construction of sums in long annuities in that case.

“This is the opinion I have finally formed after giving repeated attention to every part of the gifts in, and contents of the will and codicil, and to all the reasoning I have met with in reports. That this is a very doubtful case, and that, therefore, no opinion of mine upon it, or, as I think of any body, can be justly represented as unquestionably right, I admit; but such as my opinion is, I have stated it. If it is acted upon, the legacy in question is 100*l.* and not 100*l.* per annum.”

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“His Lordship doth order that such part of the decree made on hearing this cause on the 22d day of July, 1817, as declares that the several legacies of long annuities and long annuity stock mean so much in the long annuities, be reversed; and doth declare that the said several legacies of long annuities and annuity stock mean so much in money, to be raised by sale of a sufficient part of the said testatrix's bank long annuities. And it [\*702] is \*ordered that the said decree be also varied by directing that the costs of the relator, thereby directed to be taxed, be taxed, as between solicitor and client, and in all other respects it is ordered that the said decree be affirmed.”

## DEERHURST v. THE DUKE OF ST. ALBAN'S.

1831: 5th and 10th December.

A second rehearing, after the cause has been heard and decided in the court below, and once reheard on appeal by the Lord Chancellor, is not a matter of right, but an indulgence which the court will only grant on a special case made.

THIS was a petition of appeal from a decision of Lord Lyndhurst. The case had been originally heard and decided by Sir John Leach when Vice-Chancellor.<sup>(a)</sup> It was afterwards heard on appeal by Lord Eldon, who resigned the Great Seal before delivering judgment; and it was heard a second time on appeal in December, 1829, by Lord Lyndhurst, who, on the day he quitted office, handed his written judgment to the Registrar, simply affirming his Honor's decree. A petition was now presented, and came on for argument, praying that Lord Lyndhurst's decision might be reheard.

Sir *E. Sugden*, for the respondents, took a preliminary objection, that the appellants had no right to a second rehearing. They might have two hearings in the court below, and were then entitled to one rehearing in the Court of Appeal; but they could not have the cause twice heard in that court.

THE LORD CHANCELLOR, considering that it involved an important question of practice, directed the petition to stand over, that he might have the benefit of the assistance of the learned judges in the other branches of the court, and [\*703] that the appellant's counsel might be prepared to argue the point.

*December 10th.*—The preliminary objection was this day very fully argued before Lord Chancellor Brougham, assisted by the Master of the Rolls and the Vice-Chancellor.

Sir *E. Sugden* and Mr. *C. Romilly*, in support of the objection.

(a) 5 Mod. 231.

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Deerhurst v. The Duke of St Alban's,

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Mr. Pepys, Mr. Preston and Mr. Hodgson, *contra*.

The case was argued on both sides upon the naked question of right, without reference to any special circumstances which might be supposed to arise from the nature of the proceedings, or the manner in which the judgment appealed from was delivered. It was admitted on the part of the respondents, that the objection did not apply to motions or to petitions in bankruptcy. The following authorities were referred to; *Brown v. Higgs*, (a) *Nott v. Hill*, (b) *Porter v. Hubert*, (c) *Eyton v. Eyton*, (d) *Falkland v. Cheney*, (e) *Bovey v. Smith*, (g) *Noel v. Robinson*, (h) *Howel v. Howel*, (i) *Parker v. Dee*, (k) *Fox v. Macreth*, (l) *East India Company v. Boddam*, (m) *Williams v. Goodchild*, (n) *Gifford v. Hort*, (o) *Waldo v. Caley*, (p) *Buck v. Fawcett*, (q) *Blackburn v. Jepson*. (r)

[\*704] \*THE VICE-CHANCELLOR:—this is a question that admits of no doubt, because, though the early books show a repetition of rehearings to a great and injurious extent, yet the case of *Fox v. Macreth* before Lord Thurlow has, in fact, decided the very point now in contest. That case was first heard by Lord Kenyon, at the Rolls, then on appeal by Lord Thurlow, when his Lordship affirmed the judgment of the Master of the Rolls; and on the party attempting to have a second rehearing before the Lord Chancellor, his Lordship considered the point, and expressly decided against it: there was then an appeal to the House of Lords, and no objection was made to the course which Lord Thurlow had taken. It also appears that in the year 1807, the same doctrine was confirmed in the case of *The East India*

(a) 8 Ves. 561.

(b) 1 Vern. 167.

(c) 2 Ch. Rep. 85.

(d) 4 Bro. P. C. 149, Toml. ed.

(e) 5 Bro. P. C. 476, Toml. ed.

(g) 1 Vern. 60, 84, 144.

(h) 1 Vern. 90, 453, 460, 469.

(i) 1 Dick. 426.

(k) 2 Ch. Ca. 200; 3 Swan. 529.

(l) 3 Bro. C. C. 45; 1 Harg. Jurid.

Arg. 453, where most of the older cases are stated and commented upon.

(m) 13 Ves. 421.

(n) 2 Russ. 91.

(o) 1 Scho. & Lef. 386.

(p) 16 Ves. 206.

(q) 3 P. Wms. 242.

(r) 2 Ves. & B. 359. See also *Ormerod v. Hardman*, 5 Ves. 722; *Mackintosh v. Townsend*, 16 Ves. 330.

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*Company v. Boddam*,<sup>(a)</sup> before Lord Erskine, in which a question of a similar nature came before him : for in that case there had been first a hearing at the Rolls ; then an appeal to Lord Eldon ; and finally a petition of appeal against his Lordship's decree, which Lord Erskine after argument refused to rehear.

In this case there has been a judgment pronounced by the Master of the Rolls when Vice-Chancellor ; a petition of rehearing has been heard and decided by Lord Lyndhurst, although his Lordship, in consequence of the reasons assigned, did not state the grounds of his judgment at length ; and now the attempt is to have the appeal reheard before the Lord Chancellor, who stands in the same situation as Lord Lyndhurst would have done, had the application been made to him. It appears to me that the present case is completely bound by the authorities referred to, and that the cases of *\*Brown v. Higgs*,<sup>(b)</sup> [\*705] and *Blackburn v. Jepson*,<sup>(c)</sup> form no exceptions to the rule which those authorities establish ; for in *Brown v. Higgs* there had been a rehearing at the Rolls, and then the Lord Chancellor heard the cause when it was brought before him on a petition of rehearing ; and the like state of circumstances existed in *Blackburn v. Jepson*. But this is not the state of circumstances we are now dealing with, the question here being, whether, when the judge below has given a decision which has been solemnly confirmed by the decision of the court above, that same judge shall be called upon to rehear his decision. If, however, instead of having it already fixed, we wanted a rule, it would be wiser to adopt that of *Fox v. Macreth*<sup>(d)</sup> than to leave the matter in doubt and uncertainty.

THE MASTER OF THE ROLLS :—The more regular mode would perhaps be, that the party opposing a second rehearing should apply to have the petition of rehearing removed from the paper of appeals ; but I presume, his Lordship, on a point of so much importance, will not prevent a decision of the question upon a

(a) 13 Ves. 421.

(b) 8 Ves. 561.

(c) 2 Ves. & B. 359.

(d) Bro. C. C. 451.

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mere ground of form. I consider this as an application to rehear a judgment of Lord Lyndhurst, after his Lordship has pronounced a decision affirming that of the judge in the court below.

It does not appear to me that we are to adopt any general rule with respect to rehearings, and I do not think that any such rule can be laid down as was insisted upon in argument. *Brown v. Higgs* and *Blackburn v. Jepson* would not fall within the principle attempted to be established, for they were both causes in which two rehearings were allowed. But the question [\*706] now is, not whether \*there is to be a rehearing after a judgment at the Rolls, but whether, after there has been a hearing in the court below and another in the court above, the judgment on that second hearing shall be again reheard. Upon this point Lord Eldon's opinion in *Brown v. Higgs* is extremely distinct. There the appeal called for his judgment, and he said very properly, that he would not consent that the judgment should go to the House of Lords as affirmed by him, without hearing the argument upon it. That is a very different thing from permitting a rehearing of an appeal which the Lord Chancellor has already once heard.

It is not, I presume, contended here that there is any absolute necessity of there being no more than two hearings. It is plainly a matter of discretion in the court above, whether, after a hearing in two distinct courts, a rehearing shall be permitted. In the early reports the practice appears to have been to allow rehearings as often as the caprice or passions of the parties prompted: but it cannot be pretended that the present practice is to be governed by such precedents; and indeed we find from the case cited from Peere Williams,<sup>(a)</sup> that in Lord Talbot's time, his Lordship considered it as discretionary whether he should permit more than one rehearing. In *Fox v. Macreth*,<sup>(b)</sup> Lord Thurlow is to be considered as adopting this rule, that if there has been any decision in the court below, and afterwards one in the court above, the latter court is not bound to grant the parties a

(a) *Buck v. Fawcett*, 3 P. Wms. 242.

(b) 3 Bro. C. C. 45.

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*Deerhurst v. The Duke of St. Alban's.*

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rehearing as a matter of course; but that special circumstances may be shown that would induce the court to give such permission: and Lord Thurlow in the judgment that has been cited, distinctly denied that any authority should ever prevent him from adopting that rule.

\*It was said the rule ought to be established by the [707] legislature. That opinion, however, cannot be seriously stated. The Lord Chancellor has a right to adopt those rules of practice which will, in his opinion, promote the ends of justice. Lord Thurlow's rule has been followed by Lord Erskine; and the question is, whether the Lord Chancellor should now depart from that rule. Now it would not, I conceive, be expedient for the administration of justice, or consistent with the rule sanctioned with that view, that after two authorities have been determined, on so much consideration, a judge should wantonly depart from them.

But if those authorities had never existed, the question might still be considered upon the reason and principle of the thing. The party now asking a rehearing has already had one judgment of the Vice-Chancellor's Court, and a second judgment by the Lord Chancellor; and now he applies to have the judgment reheard: it being still open to him to have a third judgment by way of appeal to the House of Lords. Is that application consistent with reason and equity? or would it not rather be an encouragement to vexatious litigation to accede to it? I am therefore of opinion that the rule is now settled, not in ordinary cases to permit a rehearing before the Lord Chancellor; and if it were not so settled, I should submit that such a rule ought now to be adopted.

THE LORD CHANCELLOR:—I entirely agree with their Honors in the view they have taken of this case, and upon the authorities to which they have referred it. The reason why I was anxious to have their assistance was partly personal to myself, viz., that the question disposed of in one way, would save

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[\*708] \*me from a considerable labor—I mean the hearing of two most important appeals, the one at the bar, and the other that of *Fournier v. Paine*.<sup>(a)</sup> But I was also anxious that it should receive full discussion, and that the weight of their authority should be added to the decision of the court, because, though the case appeared to leave no reasonable doubt as to what the course ought to be, yet it clearly appears that some degree of uncertainty must have existed, and that the question has in some sort been considered as open. In neither case—neither in the one before us, nor in *Fournier v. Payne*, was an application made to discharge the order for setting down the petition of rehearing, but the respondents reserved the point till the cause came on, and then took it as a preliminary objection. Upon looking into the cases, I find that Lord Thurlow gave a solemn and deliberate opinion upon the very point. He himself directed attendance upon the petition, and then counsel being fully heard upon that attendance, after taking time, he delivered that judgment which has been considered in *The East India Company v. Boddam*<sup>(b)</sup> as settling the rule. And though it was said that *The East India Company v. Boddam* was only the case of *Fox v. Macreth* over again, that certainly is no reason why it should not be taken as evidence that the practice and understanding of the profession continued to be as *Fox v. Macreth*<sup>(c)</sup> had determined.

I apprehend that the distinction is justly taken between two rehearsings in the court below, and two upon appeal

[\*709] \*here; not only for the reason adverted to in the argument, but also on the ground suggested by Sir E. Sugden in his reply, viz., the difference there may be between the first hearing of the cause and the hearing in the later stage, when it has received its utmost preparation, and every topic of argu-

(a) 3 Mylne & Keen, 207, n. It ought to have been there stated, that the contest in that case was with respect to the right to a second rehearing of an order made upon exceptions: that rehearing was refused; but the cause itself was afterwards heard and determined by Lord Brougham, on an appeal from the original decree.

(b) 13 Ves. 421.

(c) 3 Bro. C. C. 45.

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*Moyle v. Moyle.*

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ment has been weighed and considered. It is, of course, much fitter that after the cause has arrived at this latter stage, a very narrow limit should be fixed to such a power of rehearing.

I understand there is no intention, on either side, to hold that the rule is absolute and inflexible. But it may well be made a question whether it should be of course to set down the petition of appeal under such circumstances, leaving the respondent to raise the objection; or whether, for the purpose of having the liberty, a special application, showing circumstances to induce the court to grant it, should not be required. Where a case, however, presents circumstances of that kind, this rule, I will not say now adopted, but rather followed from the former cases, would by no means preclude any such application.(a)

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Sir *E. Sugden* then applied that the petition might be dismissed, which, after some discussion, was ordered, without costs.(b)

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## \*MOYLE v. MOYLE.

[\*710]

1831: 11th, 12th and 15th August.

Trustees and executors who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss.

THE testator, John Moyle, gave the residue of his personal estate and effects to the defendants, Charles Moyle, John Smith, and Robert Corser, his trustees and executors, upon trust, with

(a) This case has been since considered and followed in *Mousley v. Carr*, 3 Mylne & Keen, 205. See also *The Attorney-General v. Ward*, 1 Mylne & Craig, 449.

(b) The case was finally carried to the House of Lords, where the judgment of Sir John Leach, on the merits, was reversed; *nom. Tollenache v. The Earl of Coventry*, 2 Cl. & Fin. 611.



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*Moyle v. Moyle.*

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all convenient speed, to call in his debts, and to sell and convert into money such parts of his personal estate as should not consist of money, and thereout to satisfy his debts and legacies, and subject thereto, upon trust, to invest the clear surplus in the purchase of 3 per cent. consols, or some other of the parliamentary stocks, and to apply the dividends, or so much thereof as should be necessary, towards the maintenance and education of his daughter, until her age of twenty-one or marriage; and afterwards, upon trust, to transfer the principal to her for her own use; with a bequest over, in the event of her dying under that age and unmarried, to his brother and sister equally. The will further directed that any surplus of interest beyond what was required for the maintenance of the daughter, should be, from time to time, invested in the same stock and added to the principal. It also contained the usual clauses, that the trustees should be liable each for his own acts and default only, and that they should not be answerable for more of the trust moneys than should come to their hands respectively; nor for any loss or damage which might happen without their wilful default, or by the misfeasance, failure, or insolvency of any banker, with whom the trust moneys might be lodged for safe custody or investment, or otherwise in the execution of the trusts.

[\*711] \*The testator died in the month of June, 1823, In the month of October, in the same year, the bill was filed by his infant daughter, by her mother and next friend, praying to have the accounts of the estate taken, and the plaintiff's right under the will ascertained and secured. In March, 1824, the defendants, the trustees and executors, put in their answer. A motion, against them, in the following May, that they might pay into court a balance of 260*l.*, appearing by their answer to be then in their hands, was refused; and on the 29th of January, 1825, the usual decree was made.

When the Master made his report, an exception was taken to it, by the trustees and executors, on the ground that they were thereby charged with a sum of 928*l.*, which they had claimed to

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be allowed in their discharge. The sum in question belonged to the testator's estate, and was the amount of a balance which was lying in the hands of Messrs. Sikes & Co., bankers, of London, on the 18th of December, 1825, the day on which that house stopped payment. It appeared that Sikes & Co. had been the testator's bankers, and that, after his death, they continued to be employed as the bankers of the trust estate. One of the trustees and executors was the testator's brother, to whom a moiety of the residuary property was given over, absolutely, in the event of the plaintiff dying under age and unmarried.

THE MASTER OF THE ROLLS made an order, allowing the exception; and the plaintiff appealed to the Lord Chancellor.

Sir *E. Sugden* and Mr. *Walker*, for the appeal.

The *Solicitor-General* and Mr. *James*, for the exception.

\*The particular circumstances of the case and the [\*712] principal arguments urged in support of the exception, are stated and considered in the judgment. The only authority referred to was *Salway v. Salway*(a)

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*Aug. 15th.*—THE LORD CHANCELLOR [after stating the will ]:—The testator died in the same month in which he made the will. A bill was speedily filed for the administration of his estate; and in the course of the proceedings in that suit, and in the month of May, 1824, a sum of 260*l.* being then in the hands of the defendants, the executors, a motion was made by the plaintiff to have that sum paid into court. The motion was successfully resisted; partly because it appeared that a year had not elapsed from the time of the testator's death, and, partly, also, because the sum was in itself so inconsiderable in amount. A decree was eventually obtained in January, 1825; nearly a

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(a) 4 Russ. 60, and 2 Russ. & Mylne, 215.

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twelvemonth—upon the lapse of which the present question principally arises—was then suffered to pass; and late in the same year (1825) Messrs. Sikes & Co. failed, with the money (which had now been increased to 900*l.* and upwards) in their hands; and the question is whether the loss consequent upon that failure, shall fall on the executors or on the residuary legatee.

As there is a *prima facie* case in which it was the duty of the executors to have invested the fund with all convenient speed, or, at all events, immediately after the decree in 1825, the question is whether they have shown a case which is sufficient to excuse them for having neglected so to do.

[\*718]     \*The first excuse they set up is that there was an unfortunate lease of premises in the city, occupied as an oyster shop: this lease had been assigned by the testator without taking a covenant from the assignee to relieve him from liability for the rent, which amounted to 100*l.* a year, and without any reservation of a power of re-entry in case of non-payment. It is further alleged, that the premises were in a dilapidated state, and that the tenant used to shut up the lower part of the house, and occupy the upper story; and that it was at certain seasons only that he could make any payments towards the rent at all. For these reasons it was contended that the trustees were under the necessity of keeping a considerable balance in their hands. There can be no doubt, however, that if the defendants, after paying the money into court, had been called upon by an action brought by the superior landlord for the rent, this court, having then the possession of the fund, would have interfered for their protection; or would, upon their application, have made an immediate order, placing at their disposal the necessary sum to meet the landlord's demand. But there was no necessity for paying the money into court. If they had merely invested it, that would have been sufficient; and the greater the prospect of their liability to pay the rent, the more incumbent was it upon

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Moyle, v. Moyle.

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them to render the fund productive in the mean time, by investing it in such a manner as to yield a profitable return.

The next excuse set up was that several letters were written by the solicitor of the executors, Mr. Bolton, to the solicitors of Mrs. Moyle, pressing them to consult with their client to come to some arrangement, chiefly indeed respecting the lease, one or two of them, however, with respect to the fund lying unproductive. The letters show undoubtedly that there was a certain disposition to invest the \*money, which does not seem [\*714] to have been properly met on the other side; for no answer appears to have been returned to these proposals. But the executors ought to have known that it was not necessary to have any conference or arrangement, or any consent on the part of the plaintiff to the investment, and that they might either by a common order have had the fund paid into court in the cause, or without such an order, on their own authority, have invested it in their own names. But it does appear from the correspondence, on looking into it more narrowly, that there was some disinclination and opposition to payment of the money. In a letter written in February, 1825, Mr. Corser expresses himself thus, "no money will be paid so long as that lease subsists." Now, why the executors should retain more than one year's rent I am at a loss to understand: such an expression shows that it was not altogether from omission or mere laches, but rather from an ill considered view of what they thought necessary to their own security, that they refrained from investing the money. And Mr. Bolton's letter assigns the lease as a reason why he will oppose, as his clients had all along resisted, and successfully resisted, any attempt to make them pay it into court.

In the course of the argument it was asked, why the executors did not at the very commencement of the panic, which lasted for several days, take instant and active steps for drawing out the assets in the bankers' hands and paying them into court. In answer it was said they could not do so, because an arrangement had been made for security's sake, that they should all concur in

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signing the checks; and that one of their number, Mr. Smith, having failed in the preceding September, he was out of the way at the time. This might have been a satisfactory answer, if it had been borne out by the facts. [\*715] \*But the affidavit swears very cautiously as to Smith being out of the way, and does not state that he was out of the way except at the end of the year. Besides, the arrangement is distinctly sworn to have been, not that all the three, but that two out of the three should concur in signing the checks. Now Corser lived in London, and Charles Moyle in Shropshire; and the former might at least have made the attempt of writing on the Monday, the day on which the panic began; but no attempt was made.

Taking the whole of these circumstances into my consideration, it is impossible for me to hold, that the trustees have sufficiently shown that there was no laches on their part. To permit such laxity would be most dangerous. A man may renounce a trust, or he may refuse to undertake it, but having once accepted it, whether as executor or as trustee, he must discharge its duties, so long as his character of trustee subsists; for, by consenting to assume the office, he prevents other persons from being appointed, or accepting, who might have more time and leisure to devote to it. It is no excuse, therefore, that the parties are volunteers; for they are greatly to blame in consenting to act, if they really have not time for the due performance of their duty, and injury is sustained in consequence.

In this case it is clear that, if these executors had been acting in their own affairs, they would not have allowed so large a sum to lie unproductive in the hands of a banker, exposed to the hazard of his failure. If they had entertained any doubt with respect to the necessity for a conference, they might have taken the advice of their solicitor, or have applied to counsel.

[\*716] \*What pressed me most at the hearing was the argument as to the apportionment of the liability. It was

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Attorney-General v. Smythies.

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argued that in any event 260*l.* was held, on the motion, not to be too much for the executors to retain. True, it was not so considered within a year after the testator's death; and the court might then well say it was not worth while to order them to pay in the money when the whole sum in hand was so small. But if it had been so large in amount as the sum now in question, the court would no doubt have acted differently, and would have said at once—you must invest the whole. They were not in my opinion justified in retaining it; and it would be giving a most dangerous latitude to allow executors to defend themselves by saying, “we were afraid that blame would be cast on us in case the price of stocks fell;” an apprehension quite unreasonable and absurd; for no one could have justly censured them. It is to be observed, besides, that if the court had directed an investment, it would have ordered the whole, and not merely a part, to be invested.

For these reasons I am of opinion that the order of his Honor, allowing the exception, should be reversed, and that the exception must be overruled.

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\*ATTORNEY-GENERAL v. SMYTHIES.

[\*717]

ROLLS.—1831: 18th November. L. C. 1832: 6th and 7th December. 1833: 15th and 20th January.

By letters patent of King James I., a charitable corporation was created by the name of the Master and Poor of the College or Hospital of King James, in the suburbs of Colchester, to consist of a master and five poor persons; and lands were granted to the corporation, with a direction that 52*s.* yearly should be paid to each of the five poor persons for their support and maintenance; and it was ordained that the income and revenues of the lands so granted should be expended for the support of the master and poor of the hospital, and for the maintenance and repairs of the buildings and possessions of the hospital. Under the particular provisions of the letters patent, it was held at the Rolls, that the five poor persons were entitled to share with the master in the increased revenue of the charity lands; but this decision was reversed on appeal.

The master having, in virtue of an agreement with the comptroller of the barrack office, derived a profit upon the sale of the materials of certain barracks which under a lease from the master had been erected on part of the charity lands; it

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*Attorney-General v. Smythies.*

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was held, that inasmuch as this agreement, so far as the master was a party to it, grew out of and was incidental to his official situation, the profit was not personal to the master, but was received by him in trust for the charity.

By letters patent, which were in the Latin language, and were dated the 9th of October in the eighth year of the reign of King James I., reciting that a certain college or hospital, was then lately discovered to have been founded in the suburbs of the town of Colchester, in the county of Essex, by Eudo Dapifer, formerly seneschal of King Henry I. after the conquest, commonly called the Hospital of St. Mary Magdalen, in the suburbs of the town of Colchester, for the habitation of lepers and infirm persons, for whose relief and support in those parts, as well the said Eudo Dapifer, as different kings of England, and different other persons of old time, had granted or intended to grant, certain manors, messuages, lands and hereditaments; and reciting that his Majesty was given to understand that the said college or hospital had fallen into decay, and that the chapel of the college was in total ruin, and that the lands, tenements and other possessions of the said college or hospital were in great measure dissipated and alienated, and indirectly and unjustly converted from the said pious uses, from which cause the poor of the college or hospital were not relieved or supported according to the

[\*718] intentions of the founders and other \*benefactors; and

further reciting that his Majesty, as well from his royal care and desire for the support, relief and maintenance of the poor of his kingdom, as from his inward wishes to perform all offices of charity, was desirous to provide for the foundation and perpetual relief and support of the said college or hospital, and of the master and poor who should be and be maintained in the same, and that the manors, hereditaments and possessions, which had been given or granted to the said college or hospital should be converted to pious uses, according to the pious intentions aforesaid; it was thereby ordained and granted that, from thenceforth and forever, there should be one college or hospital of the poor, in the suburbs of the town of Colchester, for the relief or maintenance of the poor, that should exist forever, and be called the College or Hospital of King James, in the suburbs of the town

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of Colchester; that it should consist forever of one master and five poor: and in order that his Majesty's aforesaid intention might the better take effect, and that the goods, lands, tenements, incomes, revenues and other hereditaments which had been granted and assigned for the perpetual support of the said college or hospital might be better governed and expended for the support and maintenance of the master and poor of the said college or hospital, and for the preservation of the said college or hospital forever, it was thereby further ordained, that thenceforth and forever there should be one master of the said college or hospital, and of the goods, chattels, lands and other possessions thereof, and that he should have the care of the souls of the parishioners of the parish of St. Mary Magdalen, in the town of Colchester, and he should there celebrate divine service; he should faithfully preach the word of God, and he should administer the sacrament in due manner, either by himself or by some sufficient minister or curate; and \*further that [\*719] there should be five poor persons who alone, either men or women, should be supported, relieved and maintained in the said college or hospital; and they should be called the poor of the College or Hospital of King James in the suburbs of the town of Colchester; and for their support, relief and maintenance, they should have, enjoy and receive through the hands of the said master for the time being, or of his assignees, annually, 52s., which should be paid to the same poor by the same master for the time being, or by his assignees, by equal quarterly payments of 13s. each, at the four usual feasts, to be paid forever yearly to each of the said poor. And his Majesty thereby appointed Henry Davye, one of his chaplains, to be the first master of the said college or hospital, and of all the lands, manors, hereditaments, and possessions thereof; commanding that the same Henry Davye, so long as he should remain in the office of master, should faithfully and diligently celebrate divine service, should preach the word of God and administer the sacrament, either by himself or by a sufficient deputy, as well to the poor of the college or hospital, as to the parishioners of the parish of St. Mary Magdalen in Colchester, in the parish church



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of St. Mary Magdalen aforesaid, adjoining to the said college or hospital; and his Majesty thereby also appointed the five persons therein named to be the first poor of the said college or hospital, to continue in the same during the term of their natural lives, unless in the meantime for any reasonable cause they or any of them should be removed: and his Majesty willed that these poor should be removed by the master of the said college or hospital as often as the case should require: and it was his Majesty's further will and pleasure that, whenever it should happen that any one or more of the said five poor should die or be [\*720] removed from the college or hospital, it should then be lawful for the said Henry Davye, and for his successors the masters for the time being, to elect and appoint one or more others in the place of him or them so happening to die or be removed, to supply the aforesaid number of five poor. And his Majesty thereby further granted and ordained that the said master and poor of the said college or hospital, and their successors thenceforth forever, should be and they were thereby created and constituted a body corporate and politic, by the name of "the Master and Poor of the College or Hospital of King James, in the suburbs of the town of Colchester." And his Majesty thereby further ordained that the Chancellor or Keeper of the Great Seal of England for the time being, should be visitor of the said college or hospital, and should from time to time, and as often as might be necessary, inspect and visit the same, and the master and poor of the college, and the state, order and government thereof; and that as often as the master of the college or hospital should die or be removed from his office, it should be lawful for the visitor for the time being to appoint a fit, sufficient and honest person to be such master. And the master of the said college or hospital for the time being was thereby authorized and empowered, with the consent of the Attorney-General and Solicitor-General for the time being, or either of them, to make, ordain and establish, good, useful and wholesome statutes, laws and ordinances in writing, touching the government, election, expulsion, punishment, order, and direction of the master and poor of the college, and to appoint any other

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things whatever concerning the college, and the ordering and disposal of the goods, rents, revenues, and possessions thereof; which statutes, laws and ordinances his Majesty thereby enjoined to be inviolably observed forever. And it was thereby further \*ordained, that the income and revenues [\*721] of all the manors, lands, hereditaments, and possessions, which had been theretofore or should thereafter be given to the perpetual support and maintenance of the said college or hospital, should be disposed of and expended for the support of the master and poor of the college or hospital for the time being, and for the support, maintenance and repairs of the houses, tenements and possessions of the college or hospital, according to the statutes, laws and ordinances aforesaid, and for no other uses or purposes whatsoever.

By virtue of the power conferred in the letters patent, Henry Davye, the first master of the hospital, with the consent of Sir Francis Bacon, then Attorney-General of his Majesty King James I., drew up and published a body of laws and statutes, for the regulation of the hospital and its members. These laws and statutes had reference principally to the powers and duties of the master, in nominating, governing, controlling, and removing the five poor persons, and in managing the concerns and property of the hospital; but partly also to the conduct and obligations of the poor. Among other things it was thereby declared, that the master, to the best of his power, should maintain the rights and privileges of the hospital, and not demise the possessions or revenues of the same; and should keep and maintain all the houses and buildings of the hospital well and sufficiently repaired, so that they might be fit and convenient for the habitation of the master and poor; that he should not make any demise or grant of a field called Magdalen, nor of the woods in the parish of Layer de la Haye, but only such as should determine and cease, by the death of the master who should make the same. That he should provide and maintain one strong chest, continually to stand in the hospital house belonging to the said master, \*where he should keep his Majesty's letters patent of [\*722]

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the foundation, as also the common seal, and all the evidences and writings of the hospital, and should likewise provide and maintain one register book, to be kept in the said chest, wherein he should register from time to time the names of the poor, and the day and year of their election; and therein should be set down the names of the several lands belonging to the hospital, and where the same lay, and such other matters as to his knowledge should tend to preserve the privileges, rights and possessions of the hospital. And it was also thereby declared, that the poor of the said hospital should diligently and frequently hear divine service and sermons, in the parish church of Mary Magdalen, in Colchester, and should receive the sacrament there four times in the year, at the least: that they should be obedient to the master in all things lawful and convenient, and should, to the best of their power, maintain the rights and privileges of the hospital: that they should reside in their several houses that should be appointed unto them by the master; and none of them should lodge a night elsewhere without the license of the master or his deputy, on some reasonable cause to be allowed by him; neither should they receive any person to lodge a night in any of their houses, without the special license of the master or his deputy.

The annual income derived from the property and possessions of the hospital had greatly increased of late years, and now amounted to 350*l.* and upwards, but no increase had been at any time made in the yearly payment of 52*s.* to each of the five poor persons; and the whole revenue of the charity, after satisfying those five yearly payments, had, from the time when the hospital was established, been uniformly received and applied by the master for the time being to his own use.

[\*723]     \*In the years 1796 and 1797 respectively, two leases of parts of the charity lands were granted by the then master of the college to the officers of the board of ordnance, for the terms of 21 years each, at certain rents, for the purpose of building barracks; and those leases contained covenants that, at

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the expiration of the respective terms, the officers of the board of ordnance should be at liberty to remove all buildings which should be erected on the demised lands, they filling up all the holes and levelling the ground, and also twice ploughing the lands full eight inches deep, and paying a fine to the master and poor of the college of two years' rent of the premises.

After the expiration of these two leases, and on the 18th of May, 1818, an agreement was entered into between the defendant, who had then become master of the college, and the comptroller of the barrack office, by which it was provided that the whole of the barrack buildings erected on the premises which had been so demised should be sold by auction; and that one moiety of the sum to be produced by such sale should be appropriated, first, in paying to the defendant, as master of the college, two sums of 60*l.* 18*s.* and 83*l.* 10*s.*, being the fines covenanted to be paid at the expiration of the leases; and then, that the residue of such moiety should be received by the defendant, in consideration of his filling up the holes, and levelling the ground and ploughing it in the manner covenanted to be performed as aforesaid by the lessees, and also as a full compensation and satisfaction for the injury which had been done to the land comprized in the two leases, or to the soil thereof, by reason of the barracks and other buildings having been erected and built thereon.

In pursuance of this agreement, the barrack buildings were pulled down and the materials sold; and the moiety \*of the proceeds, which was paid to the defendant, ex- [\*724] ceeded the sum of 5,000*l.*, the whole of which, after defraying the expenses of filling up the holes and levelling and ploughing the ground, the defendant treated as his own private property, and applied to his own use.

The information, which was filed against the Rev. John Robert Smythies, the present master of the college, after setting forth the letters patent, and stating the facts before mentioned,

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went on to charge that, in consequence of the great rise in the price of provisions, the yearly allowance of 52s. each had become wholly inadequate to the support and maintenance of the poor belonging to the hospital, and that some of them were then in the receipt of parochial relief; that in consequence of the length of time which had elapsed since the foundation of the charity, and the augmented value of the estates, the yearly allowance to the five poor persons ought to be increased so as to be adequate to their support and maintenance. It further charged that the defendant had for many years resided at Leominster in Herefordshire, and that he only visited Colchester occasionally, for the purpose of receiving the rents of the estate, contrary to the directions contained in the letters patent; and it prayed that an account might be taken of the charity estates, and of all sums of money received by the defendant in respect of the same; and that it might be referred to the Master to inquire and state what, if anything, ought to be allowed for the increase of the maintenance of the five poor persons; and also to consider and approve of a scheme for their future support and maintenance.

The defendant, by his answer, admitted that his ordinary and permanent residence was at Leominster, and that he only visited

Colchester occasionally, for the purpose of looking after [\*725] the management of the hospital \*and its estates; and

further, that he had received, after deducting expenses, a clear sum of 5,000*l.* from one moiety of the proceeds of the sale of the barrack materials.

A motion that the defendant might be ordered to pay this sum into court, was resisted upon the ground that the fund in question was not trust money belonging to the charity, but was rather to be regarded as in the nature of a windfall; and that to make such an order now would be virtually to decide the question of right upon an interlocutory application.

THE LORD CHANCELLOR refused the motion, observing that the question whether the 5,000*l.* were to be considered as in the

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nature of profit or a windfall, the view to which he at present rather inclined, or as forming part of the capital stock of the charity, was proper to be discussed and determined at the hearing; and that nothing appeared to show that the fund was exposed to any danger by being left till then in the hands of the defendant.

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*November 18th.*—At the hearing of the cause before Sir John Leach, Master of the Rolls, two questions were raised; first, whether the master was exclusively entitled to the surplus revenues of the charity property, after paying the yearly sums of 52s. each to the five poor persons, or whether the five poor persons ought not to share in the increased rents of the charity estate; and secondly, whether the moiety of the proceeds, received by the defendant from the sale of the barrack buildings, after deducting the expenses incurred by the defendant in filling up the holes and levelling and ploughing the ground, was or was not to be considered as trust money belonging to the charity.

\*Mr. *Pemberton* and Mr. *Skirrow* in support of the [\*726] information.

Mr. *Bickersteth* and Mr. *Spence*, for the defendant, the master of the hospital.

THE MASTER OF THE ROLLS:—This appears to me to be a case that admits of very little doubt. It is truly stated that it is a new case, and I do not recollect that a similar case has been brought before the court. In other cases the question has been whether the revenues of the property were to be applied wholly to the charitable purposes expressed in the letters patent, or whether the corporation to whom the property was given were to enjoy the surplus revenue which should remain after the payment of certain specified sums.

In this case it is clear, and is admitted, that the whole revenue is to be applied to the charitable uses expressed in the letters

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patent; and the question is, whether the benefit of the increased value of the property is to accrue wholly for the benefit of the master, or is to any extent to be shared by the five poor persons. The increase of the income of the charity estates, not being contemplated at the time of the letters patent, is not therein expressly provided for; and the provisions of the letters patent are therefore to be carefully examined, in order to see whether the general intention of King James can have effect, if the whole benefit of the increase is confined to the master.

In the first place it is to be observed, that the new corporation is declared to be capable of acquiring lands and tene-  
[\*727] ments for the support, relief, and \*maintenance of the master and poor; and it is afterwards ordered and enjoined that all the income and revenues of the lands then given and thereafter to be acquired, shall be disposed of and expended for the support of the master and poor; and it is, therefore, not reasonable to presume an intention on the part of King James that the master alone should have the benefit of all future grants. But the most material consideration is that it is apparent upon the letters patent that it was the intention of the king that the five poor persons should be wholly maintained and supported out of the revenues of the charity, and that the yearly sum of 52s. for each is therein mentioned, as a sum which was, at that time, adequate to such support and maintenance; and there is an express authority given to the master, with the consent of the Attorney-General and Solicitor-General, from time to time to make statutes and ordinances, and among other things, touching the ordering and regulation and disposal of the goods, possessions, rents, and revenues of the college. Under this authority the general intention of the king to provide for the full support and maintenance of the five poor persons out of the revenues of the charity might and ought to have been carried into effect, and may now be enforced by this court.

With respect to the sum received by the defendant under his agreement with the comptroller of the barrack office, it is plain

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that this agreement grew out of the situation of the defendant as master of the college, it being provided by the agreement that the rents due to the college shall be paid to him, and one part of the agreement being in consideration of the injury which had been done to the soil of the charity property by the building of the barracks. From a dealing in this character, the defendant, upon the settled principles of a \*court of equity, [\*728] cannot claim the profit as a personal benefit, and he must account as a trustee for the charity for the amount received by him under the agreement; but inasmuch as no statute or ordinance has been hitherto made for depriving the master of the surplus revenue, after the payment of the five yearly sums of 52s., the defendant will, up to this time, be entitled to the interest of what shall be found due from him upon that account.

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THE decree commenced as follows: "It appearing to have been the general intent of the letters patent that the annual allowance to be made to the five poor persons should be sufficient for their maintenance, even if incapable of labor; and it being provided by the said letters patent that the master of the hospital together with the Attorney and Solicitor-General for the time being, should have power to make and establish statutes, laws, and ordinances in writing for the disposition of the property and revenues of the said charity, his Honor doth declare that, notwithstanding the particular intent expressed in the letters patent as to the 52s., which must have prevailed in case there had been no increase of the revenues of the charity, the master of the said hospital is not now entitled to the whole income of the charity property, subject only to the annual payments of the said 52s. yearly to the said five poor persons; and his Honor doth declare that the profit made by the defendant, John Robert Smythies, in respect of his agreement with the officers of the Board of Ordnance, and his Majesty's comptroller of the barrick department, bearing date the 18th day of May, 1818, in the pleadings mentioned, being a consequence of his situation as master and



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trustee of the said charity, such profit was to be considered \*as the property of the said charity, and that the defendant, John Robert Smythies, as master, was entitled only to the interest or income arising therefrom." The decree then proceeded to direct that the master should take the usual accounts of the charity estates ; and that any of the parties should be at liberty to lay before him a scheme for the due regulation of the charity and the management of the estates belonging thereto, and for applying the rents and profits, regard being had to the present annual value thereof, for the support and maintenance of the said master of the hospital and the said five poor persons ; and such scheme was to be approved by the said master, in concurrence with the Attorney and Solicitor-General for the time being, &c.

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*December 6th and 7th.*—The defendant presented a petition of appeal against his Honor's decree.

The appeal came on to be heard before the Lord Chancellor in the month of December, 1882, when it was argued by Mr. *Spence* and Mr. *Rudall*, for the appellant, and by Mr. *O. Anderson*, for the relators.

The Lord Chancellor said he was disposed to concur in the view taken by the Master of the Rolls as to that part of the decree which declared that the money received from the proceeds of the sale of the barrack materials formed part of the charity property ; but on the other and more important question raised, with respect to the right of the almsmen to share with the master in the increased revenues of the hospital, he entertained considerable doubt. It would, therefore, be very satisfactory to him to have the case further considered and discussed with reference to that point.

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[\*780]      \**January 13th.*—It was finally arranged, that the question should be re-argued by the counsel on each side.

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Sir E. Sugden, in support of the decree.

The question turns entirely upon the construction and effect of the letters patent by which the hospital is incorporated and endowed; for the general principles of the court, with respect to the application of the surplus revenues of charity estates, are settled and indisputable. Wherever there is a general dedication of the fund to charity, although the particular objects specified do not exhaust the whole, then whatever the surplus or the subsequent increase may be, charity is entitled to that surplus or increase to the exclusion of the heir at law or next of kin; *Arnold v. The Attorney-General*,<sup>(a)</sup> So again, if the fund is portioned out among different charitable objects which completely exhaust it, those objects are entitled in the like proportions to share the benefit of any subsequent increase; *The Attorney-General v. Johnstone*,<sup>(b)</sup> *The Attorney-General v. Sparks*.<sup>(c)</sup> And the rule is the same where, after certain aliquot portions have been allotted to particular objects, the residue, and that an ascertained amount, is devised to another object of charity: for in neither case can any difficulty arise in settling the proportions in which the increase shall be distributed among all the specified objects. The latter is the *Thetford School Case*.<sup>(d)</sup> The case at bar rather resembles the case of *Arnold v. The Attorney-General* already cited, in which there was a plain dedication of the whole to charity, but the objects specified left part of the fund unapplied; and it differs from the *Thetford School Case*, in the circumstance of there being no clear appropriation of the whole fund in \*fixed proportions to different ob- [\*731] jects. In the *Thetford School Case*, however, according to Lord Coke's report, a principle was laid down by the judges which is strongly applicable to the case before the court, and which ought to be decisive of the question. The words of the report are these: "They said that this case concerned the colleges in the universities of Cambridge and Oxford and other colleges, &c. For in ancient time when lands were of small yearly

(a) Show. P. O. 22.

(b) Amb. 577.

(c) Amb. 201.

(d) 3 Rep. 130.

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value (victuals then being cheap) and were given for the maintenance of poor scholars, &c., and that every scholar, &c., should have 1*d.* or 1 1-2*d.* a day, that then such small allowance was competent, in respect of the price of victuals and the yearly value of land; and now the price of victuals being increased, and with them the annual value of the lands, it would be now injurious to allow a poor scholar 1*d.* or 1 1-2*d.* a day, which cannot keep him, and to convert the residue to private uses, where in right the whole ought to be employed to the maintenance or increase (if it may be) of such works of piety and charity which the founder has expressed; and nothing to any private use: for every college is seised *in jure collegii, scilicet*, to the intent that the members of the college, according to the intent of the founder, should take the benefit, and that nothing should be converted to private uses." The case thus put by the judges is the identical case under appeal. Estates were, by these letters patent, given to a corporation, consisting of a master and five almsmen, upon trust to pay to certain members of the corporation, namely, the almsmen, 52*s.* a year each for their support and maintenance, and to apply the residue to the upholding and repair of the buildings. From the great depreciation which has taken place in the value of money since the time when the hospital was founded, the stipends allotted for the maintenance of [\*732] the almsmen have become utterly \*inadequate for that purpose, and as the rents of the estates have largely increased, it is equally reasonable in itself and consistent with the doctrine laid down by the judges in the *Thetford School Case*, that the increased revenues of the hospital, subject to the outgoings for the necessary repairs, should in the first place be applied in raising the amount of the allowances to the almsmen, so as to provide them with a competent maintenance according to the price of provisions at the present day.

This view of the intent of the charity is strongly corroborated by an examination of the particular language and clauses of the letters patent, which may be considered as the charter of the corporation. From that charter it is manifest that the poor who

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were to be maintained in the hospital were the leading and, indeed, the only express objects of the founder's bounty. Every line of it, from the beginning to the close, favors the construction for which the relators contend. The charter commences by reciting that the hospital had been established in remote times for the habitation of lepers and infirm persons, but had fallen into decay; that the lands and possessions of the hospital, given for the relief and support of the poor of the hospital, were in a great measure dissipated, so that the poor of the hospital were not supported according to the intention of the founder and the other benefactors; and it then goes on to ordain that there shall be one college or hospital of the poor for the relief and sustenance of the poor. The poor, therefore, and the poor only, were the objects for whose special benefit, it appears as well from the recitals as the operative part of the charter, the hospital was both originally instituted, and afterwards re-established and incorporated by King James. The appointment of the master who is to \*select the almsmen, and preside over and manage the [\*733] hospital and its property, is merely subsidiary to that purpose. Except by implication, indeed, there is no beneficial gift of any portion of the revenues to the master. The estates are given to the corporation of which he is the head, paying first of all 52s. a year to each of the almsmen; and afterwards, for the maintenance and support of the master and five poor. And the restriction, which by the statutes is imposed on alienations of the charity property by the master, plainly shows that the power of disposition vested in that officer, was conferred on him merely as trustee for the hospital, and was not intended to be exercised for his personal benefit. The poor, though individually inferior to the master, are equally with him constituent parts of the corporation, and, as far as beneficial interest is concerned, must have stood in some definite relation to him. The amount of rents which he retained for his own use at the time when the hospital was incorporated, must have borne some stated and ascertainable proportion to the amount received by the almsmen: and that same proportion ought to be observed now, for it never could have been the intention of the charter that the poor, whose

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support had been so anxiously provided for, should become, as they must become, if the present application of the revenues be upheld, mere dependent paupers, to whom this miserable pittance was to be doled out by the master, while the latter was to put into his own pocket the whole surplus rents of the estates, how enormously soever those rents might increase. The consequences of a contrary construction are absurd and revolting. The almsmen were by the statutes prohibited from begging: they were to be resident, and to be maintained within the walls of the hospital. They were, therefore, prevented from working; and the sum of a shilling a week, \*a sufficient allowance in the reign of James I., was allotted to them for their maintenance. The authority given to the Master to make by-laws with the consent of the Attorney-General and Solicitor-General, in no way affects the question with respect to his beneficial interest. Those by-laws were only to be for the general regulation of the charity and its estates; and the duty of framing and promulgating them was naturally and properly delegated to that member of the corporation who was placed officially at its head, and who presided over it. The letters conclude by declaring that the income and revenues of all the lands given, or thereafter to be given, to the hospital, shall be expended for the support of the master and poor, and not otherwise. The residue, therefore, after providing for the yearly payments to the five poor, and for the repairs, is given to the corporation generally, the intention being that the five poor should each, in the first place, have a charge on the estates to the extent of 52s. a year, and that the surplus should then be distributed among all the members of the corporation, the poor as well as the master, in such proportions as might seem reasonable, or as the exigency of the case might require. And any increase which may have since taken place in the rents, ought to be apportioned upon the same principle.

Mr. Pepys, *contra*.

Although the *Thetford School Case* must now be considered as law, notwithstanding the doubts thrown out by Lord Hard-

wicke, in consequence of its violating the modern doctrine of a resulting trust in favor of the heir, the *dicta* of the judges in that case, on which the relators here rely, have been much questioned by Lord Eldon in *The Attorney-General v. The Mayor of Bristol*,<sup>(a)</sup> \*and cannot be maintained as authority at [\*785] the present day. The true effect of the letters patent was to vest the whole property in the corporation, subject to a fixed charge of 13*l.* a year, in favor of the almsmen. The beneficial interest taken by the poor is strictly limited to that sum, which possibly might, in those early days, be a competent allowance for their maintenance. Whether this really was so or not, however, there is no evidence to show; and the letters patent themselves furnish no conclusive ground for believing that it was so considered or intended. It by no means follows, because the poor were to reside within the hospital, that they were not to assist in maintaining themselves by the earnings of their own industry; for all that the charter provides is, that each of the five poor persons shall have lodgings rent free, and a fixed sum of 1*s.* a week towards his support. The beneficial interest in the residue, subject to that charge and the repairs, was plainly intended to be enjoyed by the master for his own use. It never could be meant that the master, who was required to be a clergyman, doing parochial duty, by himself or a sufficient deputy, should undertake this laborious, responsible and possibly expensive office, without receiving a single shilling for his trouble. If, however, he was to take any part of the surplus beneficially, why was he not to take the whole? No particular portion of it is allotted to him in terms; and the implication in his favor, which is strong and irresistible, extends to every portion of the income which is not expressly devoted to the other objects. The surplus might, doubtless, at the date of the foundation, bear some vague and general proportion to the amount of the allowances to the poor; it might exceed those allowances in the ratio of five to one or ten to one. But the court has no *data* upon which to ascertain that ratio now; and the amount must always

(a) 2 Jac. & Walk. 294.

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[\*736] have been extremely \*fluctuating and uncertain; for out of it the master was, in the first place, to defray the necessary out goings for repairs, and, subject to that deduction, he was to take it for better or worse; while each of the almsmen was to have his 52s. a year certain. The result of the arrangement was, that in years when the repairs were heavy, or the rents failed, the master would get little or nothing; and of course, on the other hand, when the out goings were light, and the annual profits large, his income would proportionally gain. Suppose the rents, instead of rising, had fallen considerably, will it be contended that the master would have claimed a portion of the 13*l*. allotted to the five poor? And if not, upon what principle can the poor now claim to be admitted to share in the increased revenues of the estates?

If any doubt existed as to the real meaning of the letters patent, although it is submitted there can be none, the uniform and undisputed usage of more than two centuries would weigh powerfully with the court in determining the question. The construction which the defendant contends for, has been adopted and acted upon from the institution of the hospital up to the present time. The opposite construction, indeed, would not only operate with extreme hardship upon the defendant, but it would go far to shake the titles of many of the colleges in both universities, to the estates from which their principal corporate revenues are derived. It is a well known fact that, in numerous instances, large estates have been given to those bodies to endow particular scholarships or fellowships with certain annual stipends, and that when, in process of time, the rents have risen so as to yield a surplus beyond the amount specified for those objects, the colleges have thrown that surplus into their general funds, [\*737] \*and applied them to their ordinary collegiate purposes.(a)

The principles laid down by Lord Eldon in the *Attorney-General v. The Mayor of Bristol* are closely applicable here. In that case his Lordship held that where lands were given to the cor-

(a) See *The Attorney-General v. Brazen Nose College*, 8 Bligh, 377, N. S.

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poration of Bristol, upon certain charitable trusts which did not wholly exhaust the rents, the trustees, although they were themselves, to a limited extent, objects of the donor's bounty, were, nevertheless, justified in treating the whole of the surplus, and its subsequent increase, as a fund applicable to the general purposes of the corporation. These principles were afterwards again recognized by the same great judge in *The Attorney-General v. The Skinners' Company*.<sup>(a)</sup> If there were any just grounds of complaint against the mode in which the revenues of this hospital have been distributed or applied, the proper course would be for the parties conceiving themselves aggrieved, to apply, by petition, to the Lord Chancellor, who has the exclusive jurisdiction as visitor, and not to file an information in the Court of Chancery, which, under the circumstances, has no jurisdiction.

Sir *E. Sugden*, in reply, observed that the case of the corporation of Bristol, had no analogy; for, in that case, the claim made to the surplus, and to the justice of which Lord Eldon acceded, was set up by the whole corporation who constituted the trustees, and not, as in this case, by one individual member of it only. With respect to the objection grounded on the alleged interference of the suit with the functions of the visitor, it \*was perfectly clear that a visitor had no authority to [\*738] order a new distribution and apportionment of the charity revenues, which it was the object of the present information to obtain, and which it was competent to the Lord Chancellor, only by virtue of his general jurisdiction, as presiding over all the charitable foundations in the kingdom, and in no other character, to direct.

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*January 29th.*—THE LORD CHANCELLOR:—When this appeal was originally before me, it seemed to involve a question of so much importance and novelty as to justify me in directing it to be again argued by one counsel on each side; and having had

(a) 2 Russ. 497.



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the benefit of that second argument, I have now to state the result of the best attention which I have been able to bestow upon the case.

With respect to the 5,000*l.* arising from the transaction between the master of the hospital and the officers of the barrack department, I felt disposed on the hearing of the motion in June, 1831, to look upon that sum as being in the nature of a windfall, which the master might appropriate to his own use, without applying any portion of it to the benefit of the hospital. But having now had an opportunity of more deliberately examining and considering the facts, I have come to the conclusion that this sum must be treated as forming part of the *corpus* of the charity estate; but that the master will nevertheless be entitled to enjoy his share of the annual profits of it, so long as he continues to fill the office of master. Without going further into the argument upon that point, I think it sufficient to observe that I [\*739] entirely concur in what \*seems to have been the view upon which this part of his Honor's judgment proceeded: for inasmuch as the buildings were erected on land belonging to the hospital, and, but for the arrangement made with the barrack office, must themselves eventually have become the property of the hospital, and in that case might have proved greatly more valuable than the sum that has been received in lieu of them, the master, when he took upon himself to enter into the arrangement, must necessarily be presumed to have been dealing in his official capacity, and as a trustee for the hospital; and whatever sum, therefore, he may have realized by means of such dealing, must be considered as a trust fund for which he is accountable to the charity estate.

But the other and more important question remains to be disposed of, and upon that I have the misfortune to differ with his Honor; I mean the question with respect to the construction of the deed of endowment, and the right claimed by the almsmen under it, to participate proportionally with the master in the increased income of the charity.

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The letters patent of the 8th James I. constitute the instrument which may be treated as the governing charter of this foundation. The intention of the endowment is stated in those letters to be for the relief and sustentation of the college or hospital, and of the master and poor to be and be maintained in the same; and the endowment then goes on to execute this intention in the following manner; There is to be a college or hospital for ever, consisting of one master and five paupers; there is to be a master of the hospital, and of the goods and lands thereof; and there are to be five paupers supported, relieved and maintained in the hospital; and then the endowment \*re- [\*740]peating the same words, states how they are to be supported, thus; for their support, relief and maintenance, they are to have and receive each of them through the hands of the master 52s. a Year, to be paid by the said master at the four usual feasts. And the master and paupers are incorporated by the name of "The Master and Poor of the College or Hospital of King James." And after giving power to make by-laws, with the assent of the Attorney-General and Solicitor-General, for the order and disposition of the charity estate, the letters conclude by directing that the whole of the estate shall go to the support of the master and poor, and the maintaining and repairing of the houses and possessions of the hospital, and not otherwise.

There being then no dispute that the whole is given to the charity, the question is whether the estate is given to the body, consisting of the master and almsmen, subject to a yearly payment of 52s. to the almsmen, or to the master and almsmen; in other words, whether the surplus shall go the master, whose share is not fixed, or between him and the almsmen, notwithstanding that there appears an intent to fix and limit the shares of those almsmen.

Let us first ask (as it is always right to do where no fixed rule of law prevails) what is the plain and natural sense of such a gift. If I give the whole of an estate, and other funds, to several objects, and mention the proportions in which each shall take,

no difficulty arises; they are to divide the whole in those proportions. So, if without expressly stating that it shall be so divided, I so frame the gift that no reasonable doubt can be entertained of such being my intention, it is the same thing. One most important indication of this intention [\*741] \*is, when particular amounts are given to the different objects, and the whole shares taken together exhaust the fund. This is, in fact, the *Thetford School Case*,<sup>(a)</sup> supposing the gift there had been directly to the objects of the donor's bounty and no feoffees had been interposed; for, as that case stands, a question in later times might have arisen as to a resulting trust. This, at least, was Lord Hardwicke's, and appears to have been Lord Eldon's opinion. But suppose the gift to be framed quite otherwise, and instead of expressly apportioning the whole, or impliedly apportioning it, as by exhaustion or other indication of such an intention, the fund is given entirely to one body, subject to a certain payment to other parties, the latter can only take what is given, as a charge, and the surplus must go to the donee of the fund, unless there be circumstances clearly indicating a contrary intention. Nor is there any particular form in which alone the one object of the donor's bounty can be made the primary or principal donee, and the other only the secondary donee, or, as it were, the incumbrancer upon the fund. If the gift is of the whole estate or fund to one, and another is to receive so much a year out of its rents and profits, that clearly gives the surplus to the first. Then if the gift is to both, but so as one shall take yearly so much, is not this, in substance and effect, the same thing? The whole is given to both, not in fixed proportions, but with a certain amount to the one and the unascertained residue to the other. It is distributed, and their shares are ascertained, not by division but subtraction. Now, if you examine all the cases, both those to which I shall presently refer more particularly, and the others which are well known, the cases of *Attorney-General v. Johnson*,<sup>(b)</sup> *Attorney-General* [\*742] *v. Sparks*,<sup>(c)</sup> *Attorney-General v. The Mayor of Coven-*

(a) 8 Co. Rep. 130.

(b) Amb. 190.

(c) Amb. 201.

try,(a) and *Attorney-General v. Haberdashers' Company*, (b) you will find nothing that militates against this plain and natural construction, but much that supports it. Yet the case I have put is, in substance, the case at bar; for the intention of the gift is for the relief and sustentation of the master and poor; and that intention is executed by erecting a college or hospital for the master and five paupers; the master to be master of the hospital, and of the goods, chattels and lands, &c., thereof (which distinction further aids the argument on his behalf), and the five paupers to receive for their support, relief and maintenance, 52s. each, through the hands of the master; and the funds are to go to the support of the master and paupers, and for repairs, and not otherwise. This certainly is, at the least, a gift of the whole to the master and paupers; the amount receivable by the latter being ascertained, that receivable by the former unascertained; in other words, the surplus being the master's, after paying the paupers and providing for the repairs. It is clear that there is no middle course between this construction and one which would give the paupers first their fixed payment of so much a year, and then their share of the residue also.

The importance of the question, not only in itself, but in its possible consequences, as well as the circumstance of my having the misfortune to differ with his Honor in the opinion which I have formed, induces me further to consider the authorities that are supposed to bear upon the subject. An examination of these tends greatly, I think, to confirm the view which I take.

\*The *Thetford School Case* (c) proceeded upon grounds [\*743] which are very material to be considered here. That was a devise of land to trustees for the maintenance of a preacher four days a year, a master and usher of a school, and certain poor; and certain sums were given to each, that is, to the preacher, master, usher, and poor, to the amount in all of 35*l.*, which

(a) 2 Vern. 397, and 7 Bro. P. C. 235; Toml. ed.

(c) 8 Co. Rep. 130.

(b) 4 Bro. C. C. 103.

formed the whole of the rents and profits of the land devised. The first consideration of the court, therefore, was that the whole being given to the objects of the donor's bounty, the increase of the rents and profits should be divided among them for that reason; and that the fixed payments specified should not limit the amount of the shares, though they might ascertain the proportions in which those shares were to be received by the different objects. The circumstance which raised this argument is not to be found in the present case; for here to one only of the objects, the almsmen, a sum is fixed, and the donor contemplates a surplus over that, and disposes not of it. But the other, and according to the report the principal reason for increasing the shares in that case, applies to increasing the master's share here, though, certainly, not the shares of the five paupers.

Lord Coke says, "This resolution is grounded on evident and apparent reason; for, as if the lands had decreased in value, the preacher, schoolmaster, &c., and poor people should lose, so when the lands increase in value *pari ratione* they shall gain." How is it here? If the rents fall down to 13*l.*, the paupers are to have the whole, and the master nothing. Therefore, by the argument in the *Thetford School Case*, the latter is entitled to the surplus, if any. Lord Eldon doubts if this be a sound principle; [\*744] but he admits that the \*case in Coke has settled it as law, and that it cannot be disturbed. In *The Attorney-General v. The Mayor of Bristol*,<sup>(a)</sup> his Lordship, after stating that no case has gone so far as to say that if a gift of lands takes notice of a portion of the rents allotted to a charitable use, being less than the whole rents, the charity is entitled to the surplus, refers to the case of *Arnold v. Attorney-General*,<sup>(b)</sup> as showing that a gift to A. B. for charitable purposes, and then of sums to charities, but not amounting to the whole rents, makes A. B. a trustee of the surplus for charitable purposes, to be ascertained by sign manual or by this court; and he puts the case of A. B. being a charitable corporation, and asks, "might it not be argued

(a) 2 J. & W. 294.

(b) Show. P. C. 22.

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that the gift of the lands, and certain payments out of it, would make good the recital, because one charity would take in the shape of lands, and another in the shape of a pecuniary payment?" I need hardly remark how very nearly the case put by Lord Eldon approaches the present; indeed it is not distinguishable from it in principle. There can be no doubt that the opinion intimated in the words I have just read, must have extended to the view I am taking of this case, and that Lord Eldon would, upon the same ground, have thus disposed of it.

But the whole of the case of *The Attorney-General v. The Mayor of Bristol*, is deserving of the greatest attention in disposing of the present question. In that case there was a gift of money to the corporation of Bristol, and a covenant by that corporation, which is in effect a declaration of trust, to purchase lands therewith, and out of the rents to pay certain sums to different corporate bodies in rotation, Bristol itself being one; and the question was, whether the corporation was a trustee \*of the surplus rents for those bodies. Lord Eldon de- [\*745] livered a most elaborate judgment, elaborate not only as regarded the particulars of the case itself, into every detail of which he went very minutely, but also as regarded the other cases, leaving one nothing to regret except that by some accident he had not looked at Lord Coke's report of the leading case, the *Thetford School Case*. Yet even in dealing with the imperfect report in Duke, on which his observations are grounded (and the imperfection relates only to an *obiter dictum*), he seizes with his wonted sagacity upon the error, for the difference of opinion (which he expresses in the form of a query or doubt) clearly applies to that portion of the case in which there is a discrepancy between the two reports. The whole of his reasoning and remarks are important in their bearing upon the present question, and his decision appears to me distinctly to support the view which I am now taking. He held that the corporation of Bristol was not a trustee of the surplus rents for the other corporations; upon the ground that Bristol was itself a material and prominent object of the donor's bounty, and that the case fell within the

range of those cases in which property is given to a corporate body, subject only to the charges imposed. Whoever reads the *Bristol Case* attentively, will perceive that there were several matters in it opposed to this construction, which exist not in the present case, and which nevertheless the court got over.

I shall now take notice of a passage in the *Thetford School Case*, which has more than once been commented on in questions of this kind, and has been referred to upon the present occasion. In Lord Coke's report of that case it is said, "The case concerned the colleges in the universities of Cambridge and Oxford and other colleges, &c. For in ancient time, when lands were of small yearly value (victuals then being cheap), and were [\*746] \*given for the maintenance of poor scholars, &c., and that every scholar, &c., should have a penny or three half pence a day, that then such small allowance was competent in respect of the price of victuals and the yearly value of the land; and now the price of victuals being increased, and with them the annual value of the lands, it would be injurious to allow a poor scholar a penny or three half pence a day, which cannot keep him, and to convert the residue to private uses, where in right the whole ought to be employed to the maintenance or increase (if it may be) of such works of piety and charity which the founder has expressed, and nothing to any private use; for every college is seised *in jure collegii*; scilicet, to the intent that the members of the college, according to the intent of the founder, should take the benefit, and that nothing should be converted to private uses." The question in that case was between the objects of the charity, namely, the preacher, master, usher, and poor of the school, and the devisees. But the case of the colleges put by the judges, as stated in Duke, seems somewhat different from the case as stated by Lord Coke himself, and is as if a right were given to the scholars against the college. This at least appears to have struck Lord Eldon as one interpretation of the passage; for in *The Attorney-General v. The Mayor of Bristol* his Lordship says, "If the text is to be understood thus, that where property has been given for the foun-

dation of a college, and a distribution has been at the same time made of all the rents to given members of that college, there must be an increase, as the times require, for all those persons; of that there can be no doubt.”(a) But his Lordship adds, “unless I am mistaken, there are many cases to be found in both the universities where land has been given of a greater value than the amount of the charges \*(which [\*747] have been for scholars, exhibitioners, and so on) upon that land, and where in point of fact the enjoyment has been this: the charges have been made good from time to time, and the surplus has been taken by the college itself;” and further, “I believe that if this were considered an improper application of their funds, it would have the effect of disturbing the distribution of the revenues of many of the colleges in both universities.” The report he cites is that of Duke;(b) and the fuller one in Lord Coke makes it much more doubtful if anything more was meant than that the whole gift should go for public and collegiate purposes, private uses being repeatedly put in contrast with them, three times in Lord Coke, and once in Duke. But there is a much more material difference between the two reports. That in Duke apparently puts the case of lands given not to the poor scholars, but to the college and scholars; “The resolution did concern all the colleges, &c.; for when the lands were first given for their maintenance, and that every scholar should have three half pence a day,” &c. In Lord Coke’s report the expression is, “land given for the scholars;” “When lands were given for the maintenance of poor scholars, &c., and that every scholar should have a penny or three half pence a day.” It is plainly a very different thing to say that a gift of lands or the rent of lands to maintain poor scholars, each having so much a day, is a gift to them of the whole, and entitles them to the surplus; and to say that a gift of land to a college for its maintenance, and that each scholar should have so much, entitles the scholar to a share of the surplus *ultra* the fixed sum. The former is in truth exactly the *Thetford School Case*; the latter



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[\*748] is a case not to be found decided \*either in that or in any other case. The former is the plain and definite proposition, that a gift of the whole fund in fixed proportions to the different objects of charity, vests the whole in those objects in such proportions, to the exclusion of the trustees through whose instrumentality the charitable purpose is to be effected; the latter is the position not to be maintained in argument, and for which certainly no authority can be cited, that a gift of a fund to certain parties, all alike objects of the charity, and specifying what some shall take without mentioning the others in this respect, or establishing any proportion among them, entitles those whose shares are fixed to a share also of the residue. Had the words of Lord Coke's report been accurately attended to, it never could have been supposed that this doctrine derived any countenance from that report. But I may further observe, that even had it been as in Duke, and as commented on and indeed dissented from by Lord Eldon, it is no decision; it is only an *obiter dictum* touching the possible bearing of the resolution in the case. The principal case itself of the *Thetford School* most clearly affords no countenance whatever to the doctrine.

It remains to consider whether there be any other circumstances connected with the present case which entitle us to give a different construction to the grant. To speculate upon intentions which may be supposed to exist respecting the paupers, inconsistent with the precise and defined purpose intimated as to them in their relation to the master or the body of which they form a part, would be extremely unsafe, and could indeed lead to no satisfactory result. Such topics on the one hand are met and balanced by others of at least equal force and pertinency, such as the station and functions of the master both in [\*749] the hospital and \*in the church. But there is one particular which deserves much more attention, and appears to have greatly weighed with the court below—the power given to the Master to make by-laws, with the assent of the Attorney-General and Solicitor-General, for the ordering and disposing of the charity estates. I am of opinion, however, that this does not

alter the position in which the case is left upon the construction of the rest of the instrument; first, because I take it that in making such regulations, it must always be understood that they shall not be inconsistent with the body of the rules laid down originally in the governing charter, the letters patent themselves; but next, and principally, because no such disposition as it is contended ought now to be made of the revenues, has ever been made under the power referred to; and therefore the question is, whether or not the parties can now be compelled to make it, or the court can make it for them. They can only be compelled if it be according to the intention of the donor. They would only be justified in making it uncompelled, if the donor's provisions allowed them; but they could only be called upon by the court to make it, if those provisions required them to do so. It therefore seems to me that this view of the question brings us back to the one first taken, and upon which the whole turns.

It is impossible in cases of this description to lay out of view the length of time during which a certain arrangement has subsisted, and a certain meaning has been given in practice to the instrument of foundation. If, indeed, the practice (though of centuries) has been a breach of trust, doubtless the lapse of time shall be no bar. But long adverse enjoyment is not to be thrown out of view in seeking for the true construction of the provisions under which both conflicting parties \*claim; [\*750] and a principle of distribution under a known instrument of foundation, if long acquiesced in by all the objects of the bounty from whence the funds proceed, and to effectuate the purposes of which the instrument is framed, ought not without manifest reason to be disturbed. The rule of interpretation from contemporaneous usage and long acquiescence extends over every branch of the law, independently of its connection with matter of limitation and bar. I speak not now of a course of dealing with charitable funds in the absence of evidence respecting the original endowment, or in plain opposition to its provisions. But where the endowment is forthcoming, its construc-

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tion may be aided by adverting to the long and uninterrupted acting under it, and acquiescence in that acting.

It may be added, that in all such cases of contest between the different objects of the founder's bounty, the proof seems reasonably and naturally to rest on the party setting up a fixed and restricted portion as alone due to his companions in the charity, and claiming the surplus for himself. Exclusion may not be presumed even from usage; but the usage may be a confirmation of the evidence which the instrument affords that the exclusion was intended.

I am therefore of opinion, that so much of this decree as declares that the almsmen of the hospital are entitled to share ratably with the Master in the increased revenues of the charity cannot be supported, and ought to be reversed.

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[\*751] \*THE decisions of the Court below in the following cases were brought by appeal before the Lord Chancellor, by whom they were severally affirmed; viz. —

BREASHUR v. DOR, (reported in 4 Sim. 21.)	Feb. 16. 1831.
GREENWOOD v. ATKINSON, (4 Sim. 54.)	March 4. —
BARRAUD v. ARCHER, (2 Sim. 433.)	May 9. —
SMITH v. FITSGERALD, (3 V. & B. 2.)	Aug. 8. —
EALES v. CONN, (4 Sim. 65.)	Aug. 8. —
GRINNELL v. COBBOLD, (4 Sim. 546.)	Aug. 22. —
LLOYD v. LORD TRIMLESTOWN, (4 Sim. 296.)	Aug. 23. —
Earl of NEWBURGH v. EYRE, (4 Russ. 454.)	Aug. 25. —

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THE judgments in the following cases, reported in this and the former volume of Russell & Mylne's Reports, have been carried by appeal to the House of Lords, and there affirmed, viz:—

PRITCHARD v. DRAPER, (vol. i. 191.)
COCKERELL v. CHOLMELEY, (vol. i. 418.)
CAMPBELL v. GRAHAM, (vol. i. 453.)
SALWAY v. SALWAY, (vol. ii. 215.)
CAMPBELL v. HARDING, (vol. ii. 390.)

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2. Reference to settle a scheme for the application of the revenues of an ancient hospital, of which the original foundation and endowment are unknown, but of which the master, after paying a certain fixed yearly stipend to a chaplain, and also to six almshouses who had apartments in the hospital, and defraying the repairs, applied the surplus income to his own use. *Attorney-General v. The Archbishop of York*, 461

3. By letters patent of King James I. a charitable corporation was created by the name of the Master and Poor of the College or Hospital of King James, in the suburbs of Colchester, to consist of a master and five poor persons; and lands were granted to the corporation, with a direction that 52*s.* yearly should be paid to each of the five poor persons for their support and maintenance: and it was ordained that the income and revenues of the lands so granted should be expended for the support of the master and poor of the hospital, and for the maintenance and repairs of the buildings and possessions of the hospital. Under the particular provisions of the letters patent, it was held, at the Rolls, that the five poor persons were entitled to share with the master in the increased revenue of the charity lands. But this decision was reversed on appeal. The master having, in virtue of an agreement with the comptroller of the barrack office, derived a profit upon the sale of the materials of certain barracks, which, under a lease from the master, had been erected on part of the charity lands; it was held, that inasmuch as this agreement, so far as the master was a party to

it, grew out of and was incidental to his official situation, the profit was not personal to the master, but was received by him in trust for the charity. *Attorney-General v. Smythies*, 717

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In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish, by the admission of the defendant or by evidence, a clear legal title to some land in the possession of the defendant, and also a ground for equitable relief; and where the quantity of the land of the plaintiff, in the possession of the defendant, is doubtful upon the evidence, the court will direct a commission or an issue, as will best answer the justice of the case. *Godfrey v. Little*, 630

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tempt for breach of an injunction, shall stand committed, unless cause be shown on a stated day, is not irregular if it be personally served. *Durant v. Moore*, 33

2. Privilege of Parliament is no protection against an attachment for any contempt which is of a criminal and not of a civil kind.

The clandestine removal of a ward of court from the custody of the person with whom such ward has been residing under the authority of the court, is, in its nature, a criminal contempt.

A member of the House of Commons, who had carried off his infant daughter, a ward of the court, from the house of the ladies under whose care she had been placed by the guardians appointed by the court, and who, on being personally examined by the court, admitted the fact, and refused to state the present residence of his daughter, was ordered to be committed to the Fleet, although he was not a party to the suit. *Wellesley v. The Duke of Beaufort*, 639

3. A person writing a letter to the Lord Chancellor, relative to a threatened suit, and inclosing a bank note, was held guilty of a contempt, and ordered to attend personally and show cause why he should not be committed; but afterwards, on his appearing and expressing contrition, he was discharged on payment of costs. *Martin's Case*, 674

### CONSTRUCTION.

See CHARITABLE USE, 3.  
INSOLVENT DEBTORS' ACT.  
FELLOWSHIP.  
POWER, 1, 2.  
PRACTICE, 1, 2.  
STATUTES, 1.  
SEPARATE ESTATE, 1, 2.  
WILL.

### CONVERSION.

See WILL, 5, 6.

### CONVEYANCE.

See INFANT HEIR.  
STATUTES, 1.

### COPYHOLD.

See LORD OF A MANOR.

**CORPORATION.**

See INJUNCTION, 2.

**COSTS.**

1. Where a bill is filed to set aside a will, and, upon an issue directed by the court, the verdict of the jury is in favor of the will, and a new trial is refused, the bill will be dismissed without costs, unless the validity of the will could have been tried by ejectment. *Tatham v. Wright*, 31

2. Costs, as between solicitor and client, will be allowed to the plaintiff in a creditor's suit, where there is a deficient fund. *Hood v. Wilson*, 687

See BILL OF EXCHANGE.

DEPOSIT.

FORECLOSURE SCIT.

INJUNCTION, 1, 3.

SPECIFIC PERFORMANCE.

**COVENANT.**

See WILL, 14.

**COVERTURE.**

See ANTICIPATION, 1.  
WILL, 4.

**CREDITORS.**

See EXECUTOR.  
PARTNERSHIP.  
TRUST DEED, 1.

**CREDITORS' SUIT.**

See COSTS, 2.

**D.****DEATH WITHOUT ISSUE.**

See WILL, 8, 9, 10, 13.

**DEBTS.**

See WILL, 11.

**DECLARATIONS.**

See PEDIGREE.

**DEPOSIT.**

The deposit on an appeal is merely a security for costs; and, therefore, where an appeal is dismissed without costs, the deposit will be returned, unless the court makes special order to the contrary. *Dell v. Barlow*, 686

**DISCOVERY.**

See ANNUITY.

**DISSOLUTION OF PARTNERSHIP.**

See ACCOUNT.

**DIVORCE.**

See FRAUD.

**DOUBLE PROVISIONS.**

See PORTIONS.

**E.****ELECTION.**

See WILL, 7.

**ENGRAVINGS.**

See INJUNCTION, 1.

**EQUITABLE TITLE.**

See TRUST.

**EVIDENCE.**

See ILLEGITIMATE CHILD, 1.  
PEDIGREE.  
PORTIONS, 1, 2.  
WILL, 16, 17, 18.

**EXAMINATION.**

See FELLOWSHIP.

**EXECUTOR.**

After a decree in a suit for the administration of assets, an executor is not at lib-

erty to do any act which affects the relative rights of creditors. *Shewen v. Vanderhorst*, 75

## F.

## FELLOWSHIP.

1. A person who endows a close fellowship in a college comprising other fellowships of an older foundation, will be presumed to be generally consonant of the statutes and rules of the college, and to mean that his fellow shall be subject to the same provisions with respect to election and admission as the other fellows, except in so far as those provisions are controlled by the express terms of the endowment.

Where, therefore, out of several candidates for a close fellowship, only one fulfilled all the conditions required by the endowment, that circumstance was held not to exempt him from the necessity of undergoing the usual college examination, to prove his fitness for the fellowship. But the standard of merit set up on the examination of such a candidate, should be not relative, but positive; merely ascertaining that he is duly qualified, and having no regard to the comparative qualifications of his competitors. *Ex parte Inge, In the Matter of Catharine Hall*, 590

2. Under a deed of endowment, directing that the master and fellows of a college shall elect into the fellowship thereby created and annexed to the college, a native of a particular town, "if any such shall be found able within the University," the master and fellows may examine a candidate for such a fellowship, who is duly qualified by birth, with a view to ascertain that he is "able;" and, if he is not found "able," may elect another candidate, who, without the qualification of birth, possesses the requisite "ability." *Ex parte \*\*\*\*, In the Matter of St. John's College, Cambridge*, 603

## FEME SOLE.

See ANTICIPATION.  
WILL, 4.

## FORECLOSURE SUIT.

In a foreclosure suit, to which the provisional assignee of the Insolvent Debtors' Court is made a party, as representing the owner of the equity of redemption, the costs of the provisional assignee will be ordered to be paid by the plaintiff, who will add

them, along with his own costs, to the sum due on the mortgage. *Peake v. Gibbon*, 354

## FOREIGN DIVORCE.

See FRAUD.

## FRAUD.

Where a person agrees to give up his claim to property, in favor of another, such renunciation will not be supported, if at the time of making it, he was ignorant of his legal rights, and of the value of the property renounced; especially if the party with whom he dealt possessed and kept back from him better information on the subject.

A sentence of divorce pronounced by a foreign court cannot defeat the rights acquired by parties under a marriage solemnized in England. *McCarthy v. Decair*, 614

See ANNUITY.

## H.

## HEIR AT LAW.

See NEW TRIAL.

## HOSPITAL.

See CHARITABLE USE, 2, 3.

## I.

## ILLEGITIMATE CHILD.

1. A testatrix gave a share of her residuary estate to the children of Mary Gladman, deceased. Mary Gladman left two children, one legitimate, the other illegitimate. Evidence was admitted to prove that the illegitimate child had acquired the reputation of being the child of Mary Gladman; that the testatrix well knew that fact, and that Mary Gladman left only those two children. *Gill v. Shelley*, 336

2. Where a legacy is given to a natural child, with directions to apply the interest for his maintenance, the interest is payable from the death of the testator. *Dowling v. Tyrell*, 343

## INDEMNITY.

See BILL OF EXCHANGE.



## INFANT HEIR.

The testator devised his estate to two tenants in common in fee; one died after the testator, leaving an infant heir. In a creditor's suit, after a decree for sale of the estate, the infant heir was ordered to join in the conveyance to the purchaser, under the 1 W. 4, c. 47, s. 11. *Brook v. Smith*, 73

## INFANT WARD.

See SEPARATE ESTATE, 3.

## INJUNCTION.

1. In a suit to restrain the sale of pirated copies of a print, where the answer did not suggest that the prints complained of were not pirated copies, a decree was made under the particular circumstances, though the prints, which had been exhibited to the witness who proved the offence, were not produced at the hearing.

Where the plaintiff is entitled to have the injunction made perpetual, the defendant will have to pay the costs of the suit, however trivial the subject matter of the suit may be, if he did not, after the injunction was granted, tender the costs up to that time. *Fradella v. Weller*, 247

2. Injunction to restrain the Grand Junction Water Works Company from applying to Parliament for an Act authorizing the company to procure its supply of water by means of an aqueduct from the river Colne instead of the Thames, as authorized by the existing Acts under which it was incorporated, refused.

A court of equity will not, at the instance of a shareholder, restrain a joint stock company incorporated by Acts of Parliament which prescribe its constitution and objects, from applying in its corporate capacity to Parliament, and from using its corporate seal and resources to obtain the sanction of the legislature to the remodelling of its constitution, or to a material alteration and extension of its object and powers.

The right of making such an application is incident to a joint stock company of that description. *Ware v. The Grand Junction Water Works Company*, 470

3. Where defendants, who had been imprisoned under an attachment which was afterwards set aside for irregularity, commenced actions against the plaintiffs to recover damages for false imprisonment, the court *stayed* the actions, on the terms

of the plaintiffs paying to the defendants their costs at law, and of the application to stay, and directed a reference with respect to a proper compensation for the injury which the defendants had suffered. *Phillips v. Worth*, 638

See CONTEMPT, 1.

## INSOLVENT DEBTORS' ACTS.

Under the Insolvent Debtors' Acts the insolvent is discharged with respect to debts due from him only to the extent of the sums stated by him in his schedule. *Barton v. Tullersall*, 541

## INTEREST.

See ILLEGITIMATE CHILD, 2.

## INTERPLEADER.

Where goods in the hands of a bailee have been subsequently so treated and dealt with by the bailor as to constitute or acknowledge an apparent title to them in two distinct parties, the rule which prevents an agent from filing a bill of interpleader against his principal does not apply. *Pearson v. Cardon*, 606

## ISSUE.

See PEDIGREE, 1.

## ISSUE DEVISAVIT VEL NON.

See NEW TRIAL.

## J.

## JOINT STOCK COMPANY.

See INJUNCTION, 2.

## JUDGMENT DEBT.

See CHARITABLE USE, 1.

## JURISDICTION.

See ANNUITY.  
PARTIES.

**L.****LEGACY.**

See **ILLEGITIMATE CHILD**, 2.  
WILL, 17, 18.

**LENGTH OF TIME.**

See **TRUST**.

**LIABILITY OF PARTNERS.**

See **PARTNERSHIP**.

**LIABILITY OF TRUSTEES.**

Trustees and executors who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss. *Moyle v. Moyle*, 710

See **RECEIVER**.

**LIABILITY TO DEBTS.**

See **WILL**, 11.

**LIMITATIONS.**

See **WILL**, 13.

**LOCO PARENTIS.**

See **PORTIONS**, 2.

**LORD OF A MANOR.**

Where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir.

A. being seised of a copyhold in fee, surrendered it to the use of B. and his heirs, according to the custom of the manor, but subject to the trusts of a certain indenture therein referred to; these trusts were, after giving one year's previous notice, to sell the tenement, to retain out of the proceeds of the sale a sum of 700*l.* and interest, for which the surrender was a security, and to pay the overplus to A.; B. was admitted,

and died intestate and without an heir, the 700*l.*, with an arrear of interest, still remaining due to him:

Held, that the lord did not become entitled to the tenement by reason of failure of heirs of B., and that A. had a right to redeem the premises, and, upon payment of what was due on the mortgage, to be re-admitted as tenant in fee according to the custom of the manor:

That it was the personal representative of B., and not the lord, who was entitled to receive the mortgage debt. *Weaver v. Maule*, 97

**LOST BILL.**

See **BILL OF EXCHANGE**.

**LUNATIC.**

In a case where a lunatic had two estates situate at a distance from each other, and of considerable value, the court, under the circumstances, appointed a separate committee for each. *In re Robins*, 449

**M.**

See **ILLEGITIMATE CHILD**, 2.

**MARRIAGE.**

See **FRAUD**.

**MARRIAGE SETTLEMENT.**

After the marriage of a female ward a settlement is made, under the direction of the court, for the benefit of the wife and children of the marriage, of a moiety of a plantation in Demerara, of which the wife was seised in fee at the time of the marriage; the husband and wife afterwards mortgage the estate to persons having full notice of the settlement; by the law of Demerara the settlement was a nullity, and in no manner affected the rights and powers of the husband and wife over the estate: Held, that the mortgage is valid, inasmuch as the equity of the wife and children attaches only upon the person of the husband, and not upon the estate. *Martin v. Martin*, 507

**MEMBER OF PARLIAMENT.**

See **CONTEMPT**, 2.

## MODUS.

A modus payable by every householder, in lieu of all tithes of hay, without regard to the fact whether such householder has or has not hay, is valid, but otherwise if it be alleged to be payable only when the householder has hay.

Sixpence in lieu of a tithe pig is rank: a modus for fruit and garden stuff is good, though it be not alleged to be growing in a garden. *Gronow v. Edwards*, 102

## MONUMENTAL INSCRIPTIONS.

See PEDIGREE, 2.

## MORTGAGE.

A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is, nevertheless, entitled to the benefit of his mortgage security. *Davis v. Battine*, 76

See FORECLOSURE SUIT.  
LORD OF A MANOR.  
MARRIAGE.  
WILL, 11.

## N.

## NE EXEAT REGNO.

A writ of *ne exeat regno* will not be granted to a plaintiff residing in a foreign country. *Smith v. Nethersole*, 450

## NEW TRIAL.

A motion for a new trial of two issues, was made upon three grounds: 1st, the alleged improper summing up of the judge; 2dly, because the weight of evidence was against the verdict; and, 3dly, because only one of the attesting witnesses was examined at the trial. The motion was refused on the ground, that, upon the evidence alone, without regard to the summing up of the judge, the court would not have been satisfied, if the jury had given a different verdict; and because the two attesting witnesses, who were not examined, were present in court on the trial of the issue, and tendered to the party moving for a new trial, who declined to examine them.

*Semble*, the rule is not universal, that, on the trial of an issue *devisavit vel non*, all the attesting witnesses must be examined at law.

*Semble*, that rule does not apply, where the bill is filed by the heir at law, to restrain the devisee from setting up a legal estate as a bar to the ejectment. *Tidham v. Wright*, 1

## NOTICE.

See TRUST.  
VENDOR AND PURCHASER.

## O.

## OBLIGATION TO SETTLE.

See PERFORMANCE.

## OPENING BIDDINGS.

See BIDDINGS.

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See DEPOSIT.

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## PARTIES.

Where the person, whose interests are sought to be affected by the decree, is out of the jurisdiction of the court, the suit cannot proceed in his absence. *Broune v. Blount*, 83

See PLEADING, 2.

## PARTNERSHIP.

The creditor of a partnership, in which one of the partners dies, and the surviving partners afterwards become bankrupt, has a right to resort to the assets of the deceased partner for payment, without regard to the state of the account as between such deceased partner and the surviving partners. *Devaynes v. Noble*, 495

See ACCOUNT.

## PEDIGREE.

1. Where, in a pedigree case, the object

is to connect A. with C., after proving that B., a deceased person, was related to A., it is competent to give in evidence declarations by B., in which he claimed relationship with C.

A paper in the handwriting of B., found in his repositories at his death, and purporting to give a genealogical account of his family, of which it represents C. to have been a member, is admissible for the same purpose, though never made public in B.'s lifetime, though erroneous in various particulars, and professing to be founded chiefly on hearsay.

Nature and amount of the evidence upon which the court will direct an issue to investigate a title depending on a question of pedigree. *Monkdon v. Attorney General*, 147

2. *Semble*, that in a pedigree case, statements contained in monumental inscriptions, and hearsay declarations made by a deceased relative, are competent evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other. *Kidney v. Cockburn*, 167

## PERFORMANCE.

Where a tenant for life sells part of the settled estate under the authority of an Act of Parliament which directs him to lay out the consideration money in the purchase of other lands, and to settle them to the same uses, and he afterwards purchases lands in fee simple, to nearly the amount, but dies without having settled them accordingly, leaving them to descend upon his heir at law, who was also the first tenant in tail in remainder under the settlement, a court of equity will intend that the purchase was made in performance of the obligation imposed by the act, and will not permit the remainderman to recover the value of the lands sold against the personal estate of the tenant for life. *Tubbs v. Broadwood*, 487

## PERPETUATION OF TESTIMONY.

See PRACTICE, 3.

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See INJUNCTION, 1.

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1. The bill of the husband and wife,

where it seeks relief in favor of the husband to the prejudice of the wife's interest, is considered by the court as the bill of the husband alone.

In such a case the proper course is to make the wife a defendant.

If there were no deed, and it was simply the case of a wife consenting that the husband should receive money which was given to her, then the wife's consent in court would be sufficient, without altering the form of the pleadings. *Hanrott v. Cadwallader*, 545

2. A person entitled to a share of a sum of money, which is due as a debt from a testator, cannot maintain a bill for his own share, unless he sues on behalf of himself and all other parties interested in the debt, or makes those other persons parties to the suit. *Alexander v. Mullins*, 568

## PORTIONS.

1. If a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he does not mean a double provision.

But this presumption may be repelled or fortified by intrinsic evidence from the nature of the two provisions, or by extrinsic evidence of the intention of the testator at the time of making his will.

Slight differences between the two provisions will not repel the presumption against double provisions.

Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature.

Declarations of the parent referring to his intention at the time of making his will, whether made at the time or before or after, are admissible evidence to prove that he did not mean to give a double provision.

A paper written some time after the date of his will, and showing the state of his property, but having no reference to his intention, is not admissible for that purpose.

A father, by articles made previous to the marriage of his daughter, agreed to settle, either by deed or will, lands of the value of 3,000*l.*, in trust for his daughter for life, to her separate use, remainder to the husband for life, remainder to the children of the marriage as tenants in common in tail, with cross remainders. By his will he devised a real estate worth more than 3,000*l.*, in trust for his daughter for life to her separate use, but without the power of

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anticipation or alienation; remainder to the husband for life, he maintaining and educating the children of the marriage; remainder to the children of the marriage as tenants in common in fee; with a limitation over of the shares of those who should die under twenty-five without leaving issue, to the survivors: Held, that the differences between the two provisions were not such as to repel the presumption against double portions, and that the daughter, her husband and children, were not entitled both to the benefits given by the will and to the provisions stipulated for by the articles. *Weall v. Rice*, 251

2. A testator, who has contributed to the maintenance and education of a female infant nearly related to him, from the time of her father's death, and who has been treated by her as the person whose consent was necessary to her marriage, and who has taken upon himself the obligation to make a provision for her in that event, is, as to the question of a double provision by will and settlement, to be considered in *loco parentis*; and the presumption against a double provision, which would arise in the case of a father, will apply to such a case.

In such a case, parol evidence may be adduced to prove the intention against a double provision, as well as on the question whether the testator was in *loco parentis*.

*Quere*, Whether, if the testator was not to be considered in *loco parentis*, parol evidence of his intention not to make a double provision by will and settlement would be admissible?

It being proved by parol evidence that the testator intended the provision made by the settlement to be in lieu of a legacy given by the will, the settlement was held to be a satisfaction of the legacy, though the two provisions differed so much from each other that they could not be considered substantially the same.

The legacy was not set up by a codicil, made after the first settlement, ratifying and confirming the will and all the devises and bequests therein contained. *Booker v. Allen*, 270

3. A testator, by his will reciting that he had, on the marriage of two of his daughters, advanced and transferred, for their respective benefit, 500*l*. sterling and 900*l*. bank stock, bequeathed 500*l*. sterling and 900*l*. bank stock in trust for his remaining daughter Francisca during her life, to her separate use, without power of anticipation or alienation; then for her children, subject to an exclusive power of appointment by her; and if there were no children

in whom the fund should vest, for such person, &c., as she should appoint: Francisca afterwards married; and, on her marriage, her father advanced to her 500*l*., and transferred to the trustees of her marriage settlement 900*l*. bank stock in trust for her separate use during her life; then for her husband during his life; and after his decease for the children of the marriage; but if she died in the lifetime of her husband without leaving any child, then to her husband absolutely; and if he died in her lifetime without leaving any child by her, to her absolutely: Held, that the provision made for Francisca on her marriage was an ademption of the legacies of 500*l*. and of 900*l*. bank stock. *Carver v. Bowles*, 301

4. The testator, upon the marriage of a daughter, entered into a bond for the payment of 5,000*l*. within six months after his decease to the trustees of his daughter's settlement, the interest to be paid to the husband for life; and after his decease, if the wife survived him, and there were children of the marriage, 1,000*l*., part of the 5,000*l*., to be paid to the wife, and the remainder to be applied to the use of the children of the marriage, but if there were no children, 2,000*l*. to be paid to the wife, and the remainder of the 5,000*l*. to be paid to the executors and administrators of the husband; and in case the husband survived the wife, and there were no children, then the whole of the 5,000*l*. to the husband. The testator afterwards made his will, and gave his daughter 5,000*l*., stating it to be in addition to what he had secured upon her marriage. About five years afterwards the testator executed a deed, whereby he covenanted that his executors should pay to the trustees, within six months after his death, the sum of 5,000*l*. upon the trusts of the settlement. Parol evidence of the declarations of the testator, was admitted to prove that he did not intend a double portion.

*Quere*. Whether the different interests of the husband, wife and children, in the legacy of 5,000*l*. and in the sum of 5,000*l*. given by the deed, would repel the common presumption against double portion? *Lloyd v. Harvey*, 310

5. A testator, upon the marriage of a daughter, entered into a bond conditioned for the transfer to the trustees of her settlement, during his life, or within twelve months after his decease, of 10,000*l*. 4 per cent. bank annuities; the only 4 per cent. bank annuities then existing were afterwards reduced to 3 1-2 per cents.; but there was existing at the time of his death

a new 4 per cent. stock, which had been created two years after the reduction of the old 4 per cents: the bond is satisfied by a transfer of 10,000*l.* 3 1-2 per cents.

The same testator by his will gave to a son a legacy of 20,000*l.* in "the joint stock of the 4 per cent. bank annuities, transferable at the Bank of England, commonly called four per cent. bank annuities:" the only 4 per cent. bank annuities existing at the date of his will were reduced to 3 1-2 per cents. Afterwards, and before his death, a new stock of 4 per cent. bank annuities was created: the will speaks at the testator's death, and the son is entitled to a sum of 20,000*l.* in the then existing 4 per cent. bank annuities.

A testator by his will gave to his daughter Sophia and her children, under certain circumstances, a sum of 10,000*l.* 4 per cent. annuities, and directed that, with the exception of certain sums, of which this was not one, and which were expressly ordered to be brought into hotchpot, the legacies bequeathed to any of his children were to be, not in satisfaction of, but in addition to any portion or provision to which they were or should be entitled under any articles or settlement then already executed by him; afterwards, upon her marriage, a sum of 10,000*l.* 4 per cent. bank annuities was settled upon Sophia, her husband and her children: she is not entitled to both provisions, notwithstanding the difference in the limitations.

The testator, on the marriage of another daughter without his consent, revoked a bequest of 10,000*l.* 4 per cent. bank annuities which he had made by the same will in favor of that daughter and her children, and gave her a life interest in a sum of 5000*l.* 4 per cent. bank annuities; he afterwards settled 10,000*l.* on her and her children, and by a codicil declared the settlement to be in satisfaction of the legacy: this circumstance, even coupled with the difference of the provisions, and the language of the will, is not sufficient to repel the presumption against double portions in the case of the daughter Sophia. *Sheffield v. The Earl of Coventry*, 317

POWER.

1. Where there is no appointment under a power, and no gift over in default of appointment, those persons only will take who could take by appointment.

A testator gave the residue of his personal estate to his wife, for her own sole use and disposal, trusting that she would thereout provide for his family, and particularly his only son; and, at her decease,

give and bequeath the same to her children by him, as she should appoint: Held, that the wife could appoint only by will, and that children living at her death were alone entitled to share in an unappointed portion of the fund. *Waksh v. Wallinger*, 78

2. Where, on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, and attested by two witnesses, and for default of appointment to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife, by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children. *Hopkins v. Myall*, 86

See SEPARATE ESTATE, 1.  
WILL, 7.

PRACTICE.

1. To ground an order for the serjeant at arms under the 1 W. 4, ch. 36, s. 15, rule 1, the affidavit must state the party's belief that, at the time of suing forth the attachment, the defendant was in the county into which the writ was issued, and not merely that his last known place of residence was in that county. *Handfield v. Wildes*, 91

2. To ground an order for the serjeant at arms under the 1 W. 4, ch. 36, sec. 13, rule 1, the affidavit need not state the party's belief that due diligence has been used in ascertaining the defendant's residence, and in endeavoring to apprehend him; but it must swear to those facts, and in some way or other satisfy the court of their truth. *Wright v. Green*, 93

3. The court will not make an order for the publication of depositions taken in a suit to perpetuate testimony, whilst the witnesses are alive. *Barnedale v. Lowe*, 142

4. After a residuary fund had been paid into the Exchequer, under a decree establishing the right of the crown, parties setting up a title to the fund were permitted, upon petition in the cause, and with the leave of the crown, to go before the Master for the purpose of making out their claim. *Monkton v. Attorney-General*, 147

See CONTEMPT, 1  
COSTS, 2.

REFERENCE UNDER 1 W. 4 c. 60.



**PRAYER.**

See **SPECIFIC PERFORMANCE.**

**PRESUMPTIONS.**

See **PORTIONS**, 1, 2, 4, 5.

**PRINCIPAL AND AGENT.**

See **INTERPLEADER.**

**PRINTS.**

See **INJUNCTION**, 1.

**PRIVATE HEARING.**

The consent of both parties is not necessary to a private hearing. *Ogle v. Brandling.* 680

**PRIVILEGE.**

See **CONTEMPT.**

**PROVISIONAL ASSIGNEE.**

See **FORECLOSURE SUIT.**

**PRIZE MONEY.**

Military prize, when captured, is capable of being effectually assigned by the captor, before any interest in it has been vested in him by a grant from the crown.

A warrant of the crown, conveying military prize to trustees upon trust, to collect, recover and receive the same, and directing the trustees, as soon as the case would admit, to prepare a scheme for the distribution thereof, conformably to certain principles therein stated, and to submit such scheme to the Lords of the Treasury, for the signification of the royal pleasure thereon, is not an absolute or final grant: it creates no vested interest in any particular individuals, as objects of the bounty; nor can persons claiming to be *cestui que trusts* compel a distribution under it by a suit in equity against the trustees.

*Semble*, the crown may, at any time before distribution, alter or revoke a grant of military prize. *Alexander v. The Duke of Wellington.* 35

**PUBLICATION.**

See **PRACTICE**, 3.

**PURCHASER.**

See **PERFORMANCE.**

**REAL ESTATE.**

See **CHARITABLE USE**, 1.

**RECEIVER.**

A receiver appointed by the court is answerable for the loss of moneys consequent on the failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund.

A receiver paid into a banking house the sums he received, to the joint account of his sureties, under an arrangement with them, that all drafts upon the sums so paid in, should be written by one of the sureties, and signed by himself. The bankers having subsequently failed, it was held (reversing the judgment of the Master of the Rolls), that the receiver was liable for the loss. *Salway v. Salway.* 215

**REFERENCE UNDER 1 W. c. 60.**

Proper form of the reference under the 1 W. 4. c. 60. *In the Matter of Pigott.* 682

**REHEARING.**

A second rehearing, after the cause has been heard and decided in the court below, and once reheard on appeal by the Lord Chancellor, is not a matter of right, but, an indulgence which the court will only grant on a special case made. *Deerhurst v. The Duke of St. Alban's.* 702

**REMOTENESS.**

See **WILL**, 8, 9, 10, 12.

**RENTS.**

The rule of law that the title to land cannot be tried in an action for money had and received, does not apply to cases where only the past-gone rents of lands are in question.

The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held,

That the suit was maintainable for the rents received during her continuance in possession;

That, as the defence of the Statute of Limitations was not raised upon the pleadings the account should be taken from the time when the plaintiff's title first accrued; and

That the plaintiff was not at liberty to set off the amount of such rents against payments made by the widow in her character of executrix, those payments being, by virtue of a special trust, a primary charge upon the estates, of which, subject to the widow's life interest, the plaintiff was devisee. *Monypenny v. Bristol*, 117

RENUNCIATION.

See FRAUD.

REPUBLICATION.

See WILL, 2.

REVERSIONARY INTEREST.

See BARON AND FEME.  
SPECIFIC PERFORMANCE.

REVOCATION.

See WILL, 12, 16.

ROYAL GRANT.

See PRIZE MONEY.

S.

SATISFACTION.

See PORTIONS, 4, 5.

SCHEDULE.

See TRUST DEED, 1.

SCHEME.

See CHARITABLE USE, 2, 3.

SECURITY.

See MORTGAGE.

SEPARATE ESTATE.

1. Devise of lands to trustees upon trust, to pay the rents and profits to J. H. for life, but if he should attempt to assign the same, or should commit an act of bankruptcy, or become insolvent, then upon trust to pay thereout to the wife of J. H. an annuity of 100*l*. during his life, and after his decease, an annuity of 30*l*. during her widowhood, and upon certain other trusts as to the residue for the children of the marriage: Held, first. That the annuity of 100*l*. was not the separate estate of the wife, but passed by the husband's assignment to a purchaser for value; second. That as against such purchaser, the wife had no equity for a settlement out of the annuity. *Stanton v. Hall*, 175

2. Lands were settled upon trust after the death of the settlor, to sell the same and distribute the proceeds among all the settlor's children *nominatim*; as to the shares of two who were married women, the trustees were directed to pay the same "into their own proper and respective hands, to and for their own use and benefit;" but in case they should be then dead, to pay their shares to their respective husbands for their own use and benefit: Held, that these shares did not vest in the married women to their separate use. *Tyler v. Lake*, 183

3. On the marriage of a female infant who was a ward of court, and entitled to a leasehold estate to her separate use, a settlement was made under the order of the court, giving to the trustees a power of sale over the leasehold estate: A sale made by the trustees under the power, during the minority of the female infant, is not valid. *Simson v. Jones*, 366

See BARON AND FEME, 1.

SET-OFF.

See RENTS.

## SETTLEMENT.

A husband, whose wife was entitled to a fund in court, signed a memorandum after marriage, agreeing to secure half her property on herself: Held (reversing the decision of the court below), that it was competent for the wife to waive this agreement, and that any benefit which her children might have taken under it was defeated by her waiver. *Fenner v. Taylor*, 190

See PERFORMANCE.  
SEPARATE ESTATE, 1, 3.

## SPECIFIC BEQUEST.

See WILL, 11.

## SPECIFIC PERFORMANCE.

In a suit by a purchaser to compel specific performance of a contract for the sale of a reversionary interest in stock, or in the alternative, to have the deposit repaid, the court having decided against the plaintiff's right to the principal relief sought, refused the alternative part of the prayer, and dismissed the bill with costs. *Kendall v. Beckett*, 88

## STATUTE OF LIMITATIONS.

See RENTS.

## STATUTES.

1. 1 W. 4, c. 42. *Brook v. Smith*, 73
2. The eleventh section of the 1 W. 4, ch. 47, extended to a case where the decree in the cause was made prior to the Act. *Chapman v. Tennant*, 74
3. 1 W. 4, c. 36, s. 15. *Handfield v. Wildes*, 91
4. 1 W. 4, c. 36, s. 15. *Wright v. Green*, 93
5. 9 G. 2, c. 36. *Collinson v. Pater*, 344
6. 53 G. 3, c. 102. *Barton v. Tattersall*, 541
7. 1 W. 4, c. 60. *In re Pigott*, 683

## T.

## TENANT FOR LIFE.

See PERFORMANCE.

## TITHES.

See MODUS.

## TIME OF PAYMENT.

See WILL, 11.

## TRUST.

A testatrix devised a customary tenement to John, without words limiting the inheritance. Upon her death, the dormant surrenderee, in whom the legal estate was, surrendered the fee to John; and John died more than forty years before the filing of the bill, having surrendered the tenement to a purchaser, who had notice of the will of the testatrix: Held, that the equitable title of the heir, which accrued on the death of John, was barred by length of time. *Collard v. Hare*, 675

See LORD OF A MANOR.  
PRIZE MONEY.  
TRUST DEED, 1.

## TRUST DEED.

1. A person by deed conveyed to trustees certain personal property, upon trust to sell the same, and, after satisfying certain specified charges and claims in a prescribed order out of the proceeds, to divide the residue among his scheduled creditors, none of whom were parties or privy to the execution of the deed. The trustees, after partially executing the trusts by making sales and paying off the specified charges and claims in the order directed, concurred with the grantor in doing several acts inconsistent with the subsequent trusts: Held, that after the death of the grantor a scheduled creditor had no equity against the trustees to enforce the execution of the trusts, the conveyance being in the nature of a private arrangement for the personal convenience of the grantor, and vesting no right in the creditors. *Garrard v. Lord Lauderdale*, 451
2. Where consignments have been made from abroad to answer an annuity which the owner of the property consigned

is liable to pay, and the consignee in this country gives notice of the arrangement to the annuitant, and makes payments in pursuance of it, the consignee is not afterwards at liberty to discontinue such payments, so long as he has any proceeds of the consignments in his hands.

The circumstances of such a transaction constitute an implied trust, which the court will enforce against the consignee, for the benefit of the annuitant. *Fitzgerald v. Stewart*, 457

# TRUST OF A TERM.

See *BARON AND FEME*, 2.

# TRUSTEE.

See *LIABILITY OF TRUSTEES*.  
*POWER*, 2.  
*RECEIVER*.

# U.

# UNCERTAINTY.

See *WILL*, 1.

# V.

# VENDOR AND PURCHASER.

Under an agreement of exchange between A., who held lands under a college lease, and B., the owner of an adjoining estate, B. occupied part of the college lands, and A. had occupied, along with the residue of the leasehold, part of B.'s estate. A. having become bankrupt, the college leasehold was sold, and was described in the particulars of sale as "late the residence of A.:" Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation. *Miles v. Langley*, 626

# VESTED INTEREST.

See *WILL*, 10.

# VESTING.

See *WILL*, 15.

# VOLUNTARY CONVEYANCE.

See *TRUST DEED*, 1.

# W.

# WAIVER

See *SETTLEMENT*.

# WARD OF COURT.

See *SEPARATE ESTATE*, 1.

# WIFE'S CONSENT.

See *PLEADING*, 1.

# WIFE'S EQUITTY.

See *MARRIAGE SETTLEMENT*.  
*SEPARATE ESTATE*, 1.

# WILL.

1. Conditional bequest, "to the fellows and demies of Magdalen College, Oxford," upon the happening of a particular event, held void for uncertainty; the language of the condition, and the description of the legatees being so loose and obscure, that the court was unable judicially to collect the intention of the testator with respect either to the individuals who were to take, or the time and manner of their taking. *Attorney-General v. Sibthorp*, 107

2. Where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, it has not the effect of republishing that will so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital. *Money Penny v. Bristol*, 117

3. A testator gives to his mother an annuity for life, and after her decease to his sister, if she be a widow, but not otherwise, but to revert back to his children, after her death. At the death of the testator and of the mother, who survived him, the sister was a married woman: Held, that the sister, on afterwards becoming a widow, was not entitled to the annuity. *Barileman v. Murchison*, 136

4. A testator directed that one third of his residuary estate should be invested in the purchase of an annuity for the life of a

female, who was single at the date of the will and the death of the testator, and this annuity he gave to her separate use, and independent of any husband she might happen to marry, and without power to sell or assign the same by anticipation. The Master of the Rolls, upon the ground that the restraint against alienation or anticipation would be valid in case of future coverture, refused to order payment to the legatee of the price which would be paid for the annuity. But the Lord Chancellor held that she was entitled, if she chose, to the fund at once, without having it laid out, and that this option was not affected by the clause against anticipation. *Woodmeston v. Walker*, 197

5. A testatrix gave her real estates upon trust to be sold, and directed the moneys to arise from such sale to be considered and taken as part of her personal estate; she then willed, that out of the moneys to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and of the moneys arising from the sale of her real estate, upon trust for two persons and their children. Some of the pecuniary legatees having died in the testatrix's lifetime; it was held (reversing the decision of the court below), that the conversion of the real estate into personal, directed by the will, was not absolute, but partial only, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir at law. *Amphlett v. Parke*, 122

6. Where a testator directed his real and personal estate to be sold, and his debts and legacies to be paid, including certain charitable legacies, and gave the residue of the mixed fund to A. and B., the failure of the charitable legacies was held to inure to the benefit of A. and B. *Green v. Jackson*, 238

7. A testator, having under a settlement a power of appointing by will a sum of 7,150*l.* bank stock, in respect of which three bonuses had been paid and invested since the date of the settlement, by his will, after mentioning the original amount of stock, and making an erroneous reference to the first bonus, as then consisting of 715*l.* 5 per cent. stock, appointed the said sum of 7,150*l.* bank stock, and the said sum of 715*l.* per cent. bank annuities, "together with all such further additions in the nature of profit to be made to the

said bank stock in his lifetime." Held, that the appointment extended to all the bonuses.

A testator having a power under his marriage settlement to appoint a fund among his children, appointed it to his two sons and three daughters in equal shares, and then declared that the shares appointed to his daughters should be held on the same trusts for the benefit of his daughters and their issue as were therein expressed concerning the shares of his residuary estate bequeathed to each daughter and her issue: under these trusts the daughters took in their respective shares of the residue a life interest to their separate use, but without power of anticipation or alienation: Held,

That the shares of the settled fund were well appointed to the daughters absolutely but to their separate use during their respective lives, and without power of anticipation or alienation:

That no case of election was raised in favor of the issue of the daughters against the daughters or their husbands. *Carver v. Bowles*, 304

8. A gift over of money upon the death of a legatee without issue is void, unless from the words of the will it can be collected that the testator meant a death without issue at the time of the death of the legatee.

A testator gave to his brother 300*l.* per annum during his life, and to each of two nephews 150*l.* during their lives; but if either of the nephews died, the other to inherit the whole 300*l.*; and if the brother died without issue, the two nephews to inherit from the brother: and he then proceeded to state that the reason why he left only the interest to his brother and two nephews was, that, if they died without issue, the money might go to his three cousins, to be divided equally between them: the brother and nephews all died without issue: Held, that the gift over to the cousins was void, as being too remote. *Lepine v. Ferard*, 378

9. A testator by his will gave to Caroline, described as his natural daughter, a sum of stock, and his house and land at C.; with a direction that if she married, the property should be settled solely upon herself and children; but, in case of her death without lawful issue, the money so left to her to be equally divided betwixt his nephews and nieces who might be living at the time, and the land at C. to his nephew J. H.: Held, that Caroline took an absolute interest in the stock. *Campbell v. Harding*, 390

10. Where real and personal estates are given together for life, and so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal estate at twenty-one being a son, or at twenty-one or marriage, being a daughter, and there is a gift over in the event of the tenant for life dying without issue, it is to be intended a dying without such issue as would take by force of the prior limitations.

A testatrix, after bequeathing divers annuities and legacies, and amongst others, a sum of stock to M. M. to vest at twenty-one or marriage, devised and bequeathed a West India plantation, and all the residue of her money in the funds, after payment of the annuities and legacies therebefore bequeathed, and also her plate, books and certain portraits, to E. G. T. and M. T. for their lives equally, and after the death of either, the whole to the survivor for life, and after the decease of the survivor, then unto such children of M. T. as she should by deed or will appoint; and in default of appointment, then the plantation and the residue of the money in the funds to be equally divided among the said children and their heirs; and if but one child, the whole to such child and his or her heirs, the funded property to be an interest vested in them, being sons, at twenty-one, and being daughters, at twenty-one or marriage; but in case M. T. should die without issue of her body lawfully begotten, the testatrix devised the plantation equally among all the children of A. W. and their heirs; and in case M. T. should die without issue as aforesaid, she then bequeathed her said residue of her money in the funds, and all her said plate, books and portraits, unto J. M. for life, and after his decease to his eldest son forever: but, in case J. M. should die under age and without issue, then the said residue of her money in the funds, plate, books, and portraits unto M. M. absolutely. All the rest and residue of her estate and effects the testatrix gave and bequeathed unto E. G. T. and M. T. absolutely. M. T. having survived E. G. T. and died without having been married, it was held,

That J. M. took a life interest in the funded property;

That J. M. took no interest in the plate, books and portraits, the limitation over of those articles being too remote;

That the stock legacy to M. M., which had lapsed by her death under age and unmarried, passed under the residuary bequest of the funded property, for the benefit of J. M., and did not sink into the general residue. *Malcolm v. Taylor.* 416

11. Where freehold, copyhold and leasehold estates are devised, subject to a general charge for the payment of debts, and the freeholds and leaseholds are subject to mortgages, and there is a descended freehold estate purchased after the will, the general personal estate not specifically bequeathed is first to be applied in payment of simple contract debts as far as it will extend, and the surplus of simple contract debts is to fall proportionally on the freehold, copyhold and leasehold estates devised: then the specialty debts, including all mortgage debts, are to be satisfied out of the descended freehold estate as far as it will extend: and the surplus of such specialty debts is also to fall proportionally upon the freehold, copyhold and leasehold estates devised.

Where a testator gives an annuity to A. for life, payable quarterly, the first payment to be made within eighteen months after his death, the annuity does not commence till fifteen months from the death of the testator.

*Semble*, furniture specifically bequeathed, ought to contribute to the payment of the debts proportionally with the devised real estates.

Where a testator gives an annuity to A. for life, and directs the first payment to be made within one month from his, the testator's death, the annuity commences from the death of the testator; and though the first year's payment is to be made at the appointed time, the payment for the second year does not become due till the end of the year. *Irvin v. Ironmonger.* 531

12. Where a testator makes a codicil, without professional assistance, his expressions are not to be construed literally and technically, if upon the whole instrument it appears that he meant to use them in a different sense.

A testator by his will devised all his real estates to trustees, upon trust for his son during his life, with remainder to the son's children in strict settlement, and, for default of such issue, to the testator's brother for life, remainder to Robert in tail; and he gave the residue of his personal estate to the same trustees, on trust, subject to two annuities, for the children of his son, and failing them, for his brother for life, and after his death, for Robert absolutely. The brother died; and the testator afterwards made a codicil, by which, after reciting that in case his son should die without an heir male or female, he had bequeathed his estates in the parish of Missenden and elsewhere to Robert, he revoked that part of his will, and excluded

Robert from all chance of benefit under the will, and in the place of Robert, he, if his son should die without heirs male or female, bequeathed all the estates he had or might have at the time of his death in Missenden or elsewhere, which by virtue of his will were the sole property of his son, to Thomas and the heirs of his body, subject to the same conditions of entail as were imposed on the son; and in case Thomas died without heirs, he bequeathed all the estates which Thomas would inherit by the death of the testator's son, to Jacob and his heirs, subject to the payment of the testator's debts and annuities: Held, that the gift of the residue of the personal estate to Robert was revoked, and that this residue was not undisposed of, but was given to Thomas. *Read v. Backhouse*. 546

13. A testator by his will devises all his real estate to his executors for the purposes thereafter stated; and, after empowering them either to continue his business or to dispose of it, he gives the profits of it in the one case, and the interest of the moneys arising from the sale in the other, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives her the rents and profits of all his real estates during her life; and at her decease he devises and bequeaths to her heirs all his estates real and personal as tenants in common: if his daughter has but one child, such child is to possess the whole; but if she should die without issue then at her decease he gives certain legacies. He next directs all his goods and effects to be sold, his said legacies to be paid, and a sum invested sufficient to purchase 150*l.* a year, which is to be paid to the husband of the daughter. He then orders his real estates to be sold at the decease of his daughter or at the decease of his brothers and sisters, according as a particular event may turn out; and he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, and the rents of them until they are sold. The daughter died without having had issue: Held,

That the daughter took an estate tail in the freeholds;

That the real and personal estate being given over together, she took the personal estate absolutely;

That the annuities and legacies given at her decease were charged both on the real and personal estate, and were to be borne proportionally by the two funds. *Dunk v. Fenner*, 557

14. The testator upon the marriage of his daughter Catherine, covenanted to make her fortune equal to that of any one of his other five daughters. By his will he gave to Catherine absolutely a provision equal to that which he gave to any one of his other five daughters and their issue; but the fortunes bequeathed to these five daughters were limited to them for life only, with remainder to their issue; and in case any one of the five should die without leaving issue, her share was to go to the others of the four daughters and their issue, in the same manner as their original shares. One of the five died without issue: Held that Catherine could not claim an additional provision in respect of the benefits thereby derived by the other four daughters and their issue; her absolute interest in her own share being equivalent in value to the interests of the other daughters and their issue in their respective shares, and their contingent interests in the shares of each other. *Clegg v. Clegg*, 579

15. A testator appoints a fund, after the death of his wife, to his son, to be paid to him at her decease, if he shall then have attained twenty-one; and in case his son dies under twenty-one, and after the wife, he gives the fund to his brother; and in case the wife shall outlive both the son and the brother, he gives it to the brother's daughters then living. The son attained twenty-one, and died in the lifetime of the wife, who survived both the son and the brother: there were daughters of the brother then living: Held, that the representatives of the son, and not the daughters of the brother, were entitled to the fund. *Clutterbuck v. Edwards*, 577

16. A testator by his will gave a specific chattel to A. Afterwards by a codicil, he gave a number of articles of a different kind, and of much less value, to B., and in enumerating those articles, introduced an imperfectly written word which might be supposed to designate the chattel previously given to A: Held, that the bequest to A. was not thereby revoked.

If property described in distinct and unambiguous terms is bequeathed to a particular person, a subsequent bequest of the same property to another must, in order to be effectual, designate the subject matter of the gift in words so legibly written that no reasonable doubt can be entertained with respect to them. *Goddet v. Beechey*, 624

17. A testatrix by a codicil gave to A. and M., "50*l.* each of bank long annuities,

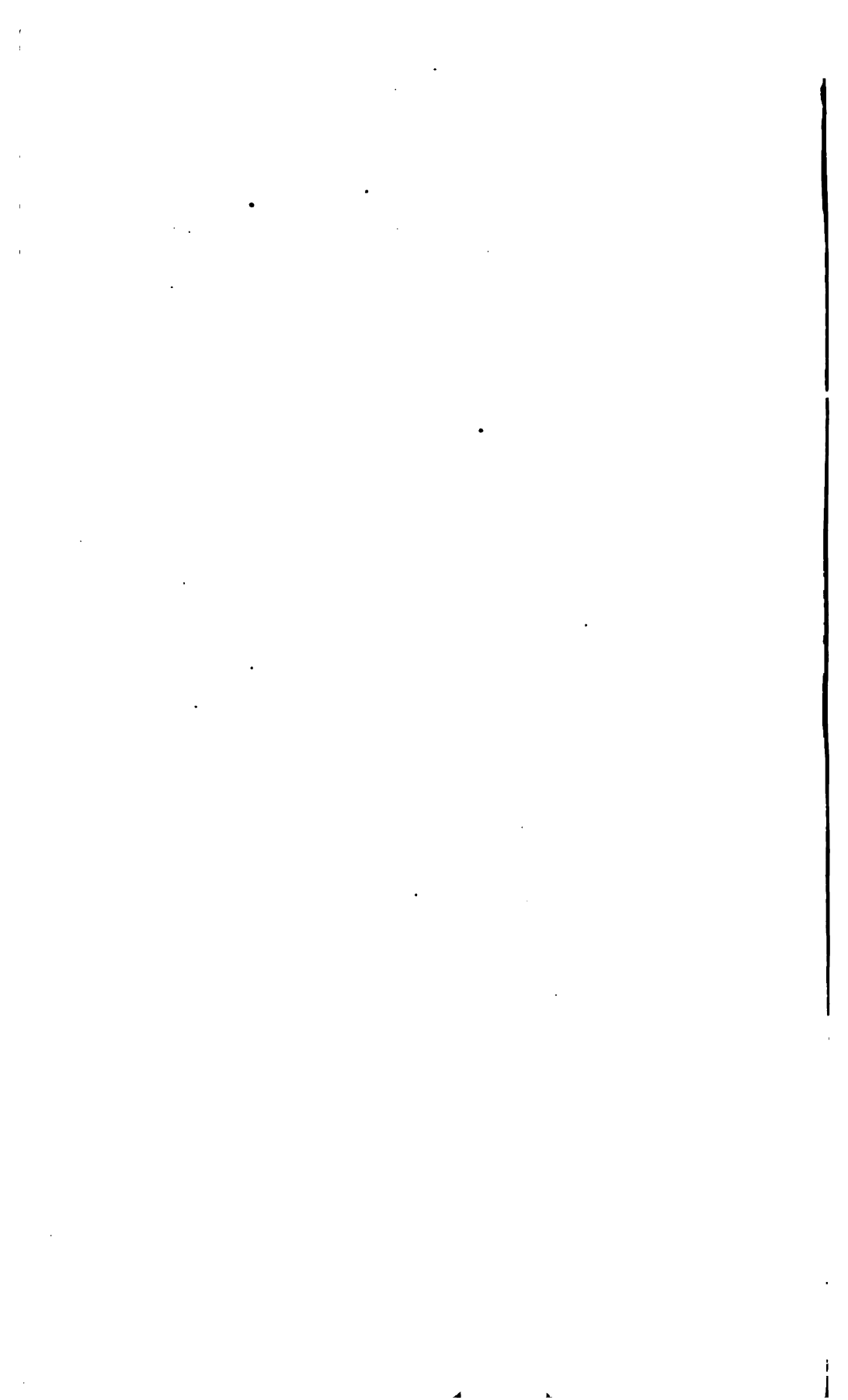
now standing in my name." At the date of the codicil and at her death, she possessed long annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted; and on the effect of that evidence, and the language of the testamentary papers, taken together, the bequests to A. and M. were

held not to be specific, but pecuniary.  
*Boys v. Williams*, 699

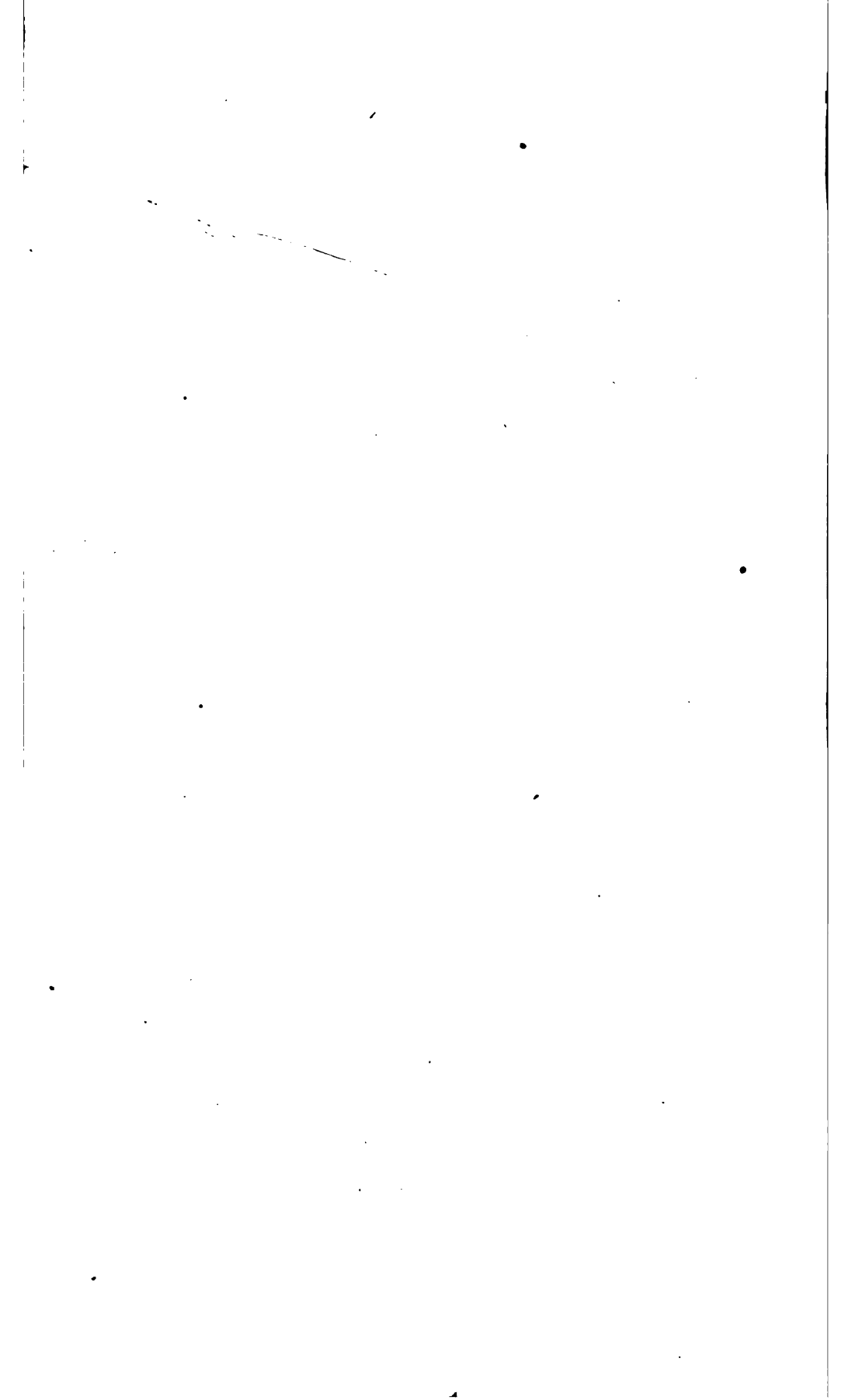
18. Legacy of "100l. long annuities stock" held, upon the context of the will and the terms of the gift as compared with those of the other bequests, and upon the evidence of the state of the funded property, to be pecuniary and not specific.  
*Attorney-General v. Grole*, 699.

See POWER, 1.









# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

## HIGH COURT OF CHANCERY,

IN

## IRELAND,

DURING THE TIME OF

LORD CHANCELLOR SUGDEN,

FROM THE COMMENCEMENT OF HILARY TERM, 1835, TO THE  
COMMENCEMENT OF EASTER TERM, 1835,

By BARTHOLOMEW CLIFFORD LLOYD

AND

FRANCIS GOULD, Esqrs.,

BARRISTERS AT LAW.



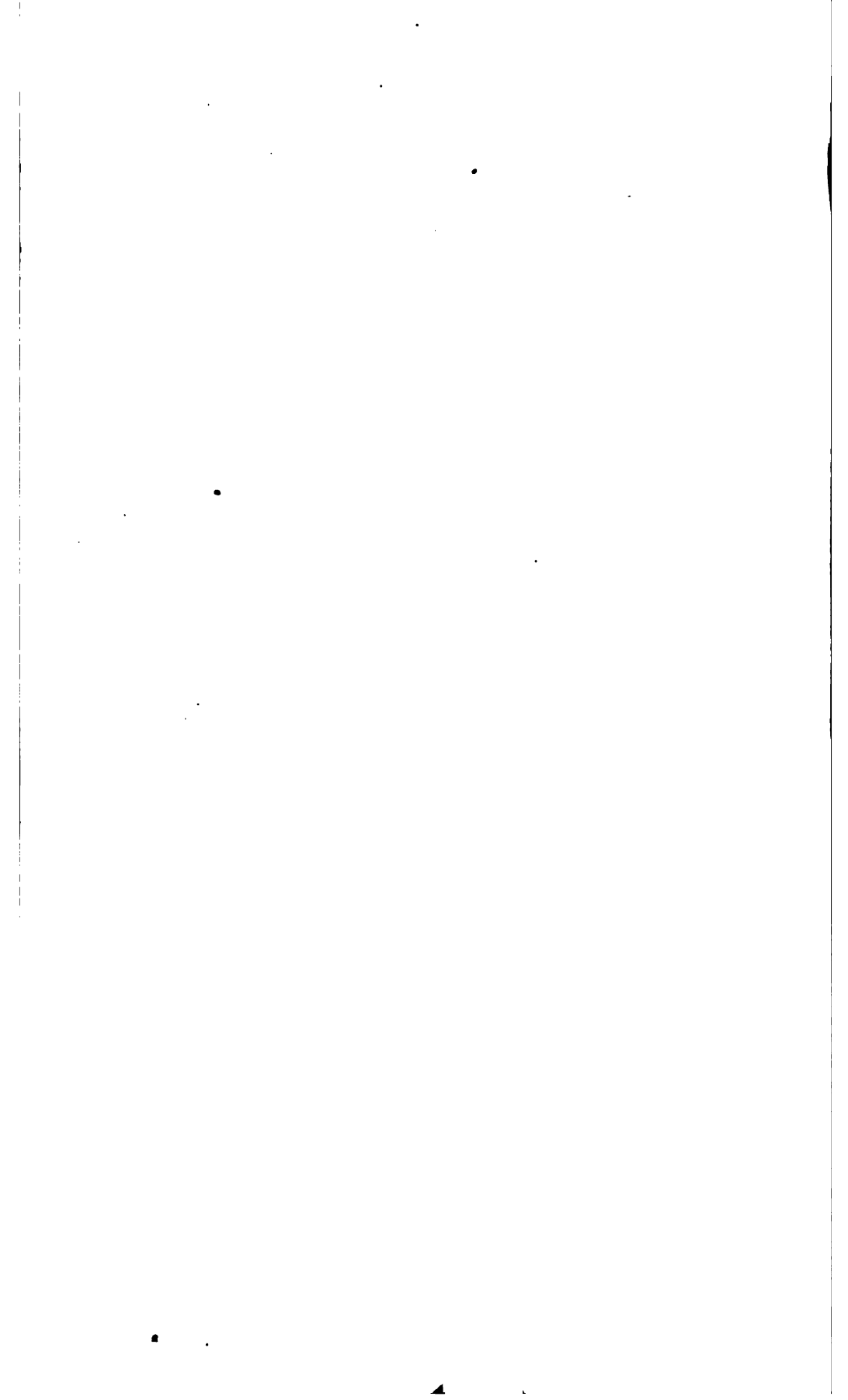
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1854.



THE RIGHT HON. SIR EDWARD B. SUGDEN, *Lord Chancellor.*

THE RIGHT HON. SIR WILLIAM M'MAHON, *Master of the Rolls.*

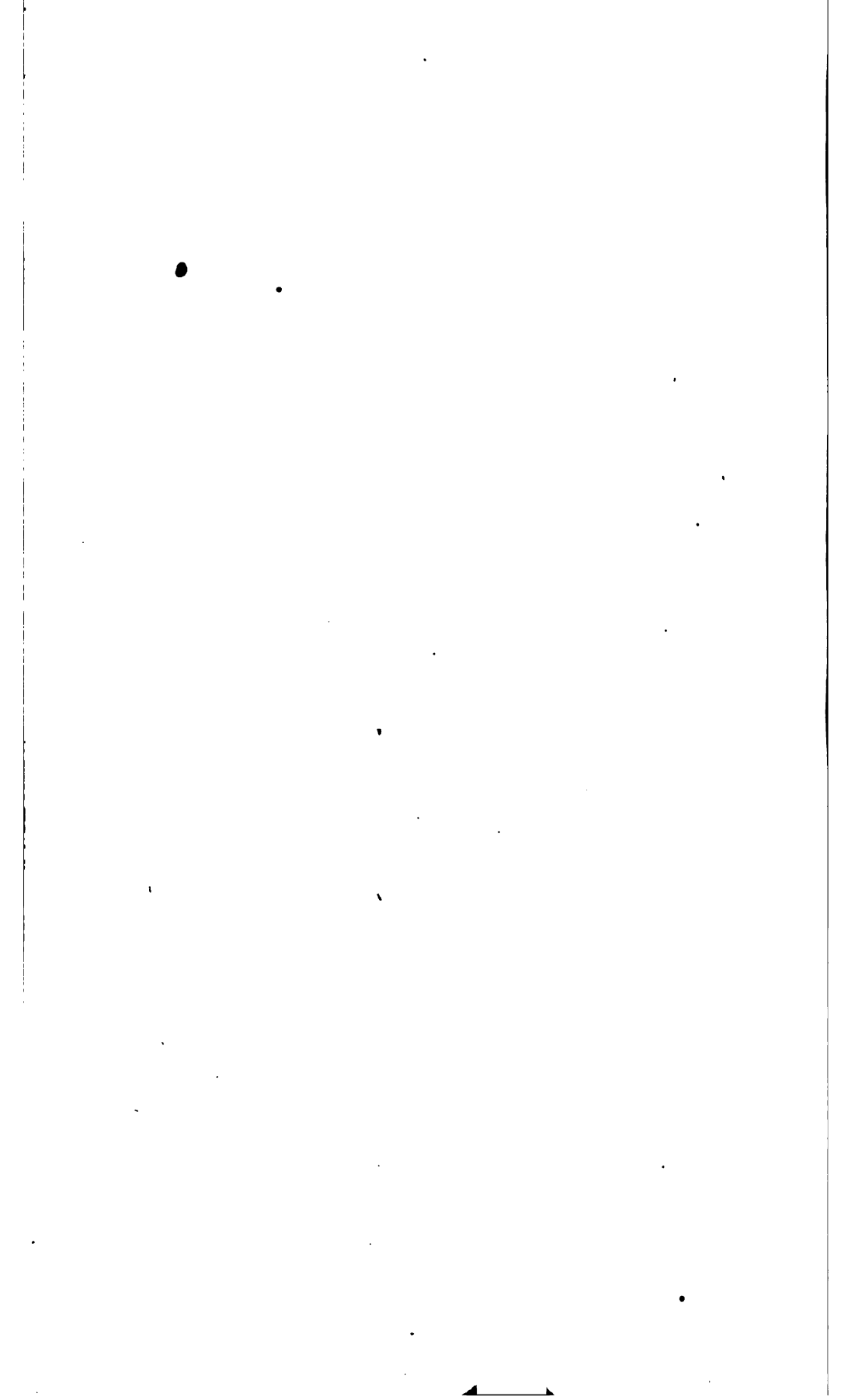
THE RIGHT HON. FRANCIS BLACKBURNE, *Attorney-General.*

EDWARD PENNEFATHER,       -       -       -       *Solicitor-General.*

LOUIS PERRIN,       -       -       -       -       -       *First Serjeant.*

RICHARD WILSON GREEN,       -       -       -       *Second Serjeant.*

JOSEPH DEVONSHER JACKSON,       -       -       -       *Third Serjeant.*



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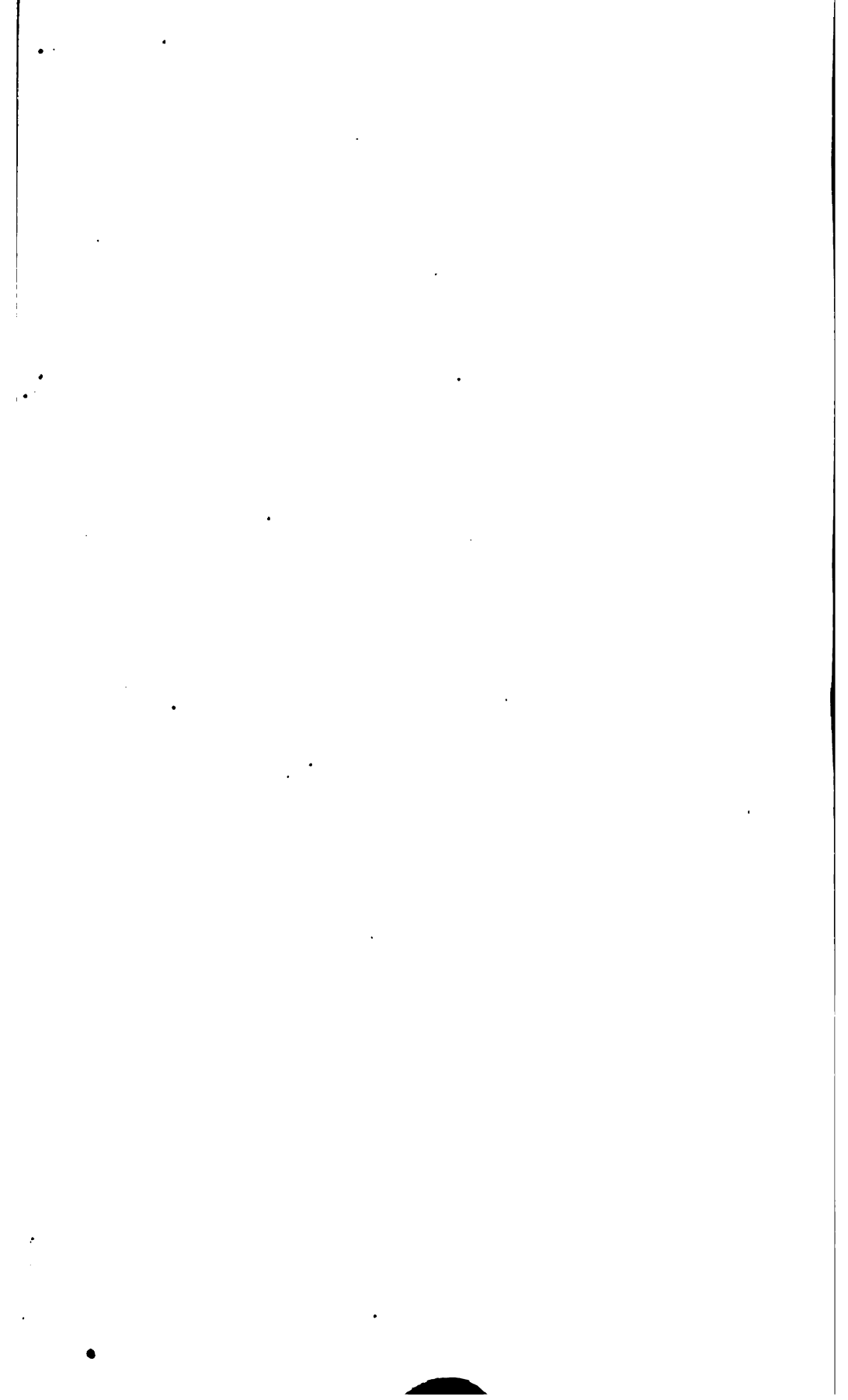
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CASES  
ARGUED AND DETERMINED  
IN THE  
HIGH COURT OF CHANCERY,  
IN IRELAND,  
DURING THE TIME OF  
LORD CHANCELLOR SUGDEN.

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\*LESLIE v. LESLIE.

[\*1]

1835: 14th January.

Interest from the death of the testator allowed upon legacies payable at a future period to infant grandnephews, upon the intention of the testator that they should be maintained out of the property bequeathed to them.

The court rate of interest, where no rate is fixed by the parties themselves, is in this country to be calculated at five per cent., pursuant to the 204th new rule, which was held to apply to a legacy, under a will made prior to the publication of the rule.

HENRY LESLIE being possessed of certain estates, made his will on the 20th of May, 1831, by which he devised his estates, in the county of Fermanagh, to his nephew George Leslie (the father of the plaintiffs), and his heirs male lawfully begotten, with remainders over in default of such issue. And after several other devises and bequests, he left his cottage of Mara Retreat, and the land thereunto belonging, to the said George and his then wife, and for her and their children's use, with the furniture, &c. The testator then recited, "that since he commenced writing his said will, it had pleased the Great \*Disposer to recall his [\*2] said nephew George, who had left a widow and four children, and that he felt it incumbent on him to secure for the use

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Leslie v. Leslie.

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and support of the three younger of these, a certain portion of the property he bequeathed to their late father, without disturbing or altering the several bequests and entailments he had already made, further than subjecting the said property or estate so bequeathed to their late father, to a sum of 2,400*l.* for the use and support of the said younger children, share and share alike." And the more effectually to carry his intentions into effect, he again bequeathed to the trustees first named, the premises originally left to his nephew George, upon trust that the aforesaid premises should stand charged with the sum of 2,400*l.* for the use and support of the said younger children, to be paid to them, share and share alike, on their severally attaining the age of twenty-one years, or day of marriage. The testator died in October, 1832, and the bill was filed on behalf of the three younger children of George Leslie by their next friend, for the purpose of carrying the trusts of the will into execution.

A question was raised, as to whether interest on the sum of 2,400*l.* was payable to the plaintiffs from the death of the testator.

Mr. Warren and Mr. William Lloyd, for the plaintiffs.

The plaintiffs are entitled to interest from the death of [\*3] the testator, as the sum of 2,400*l.* was given expressly \*for the use and support of the younger children. In *Pett v. Fellows*,<sup>(a)</sup> interest was allowed on legacies to "infant cousins," from the death of the testatrix.

Mr. Moore and Mr. George, contra.

The testator was merely granduncle to the plaintiffs; if he stood *in loco parentis*, it is unquestionable the sum would bear interest from his death, but if a legacy be given by a person not *in loco parentis*, it does not carry interest from the death of the testator, unless there be an apparent intention on his part that it should. The words in this case do not necessarily imply that

(a) 1 Swans. 561, n.

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Leah v. Leah.

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this sum is to bear interest; the question depends upon the construction to be given to the words "use and support," which can be explained by a reference to a future as well as a present support.

THE LORD CHANCELLOR:—The only question for me to decide is, whether or no the 2,400*l.* carries interest. The case of *Pett v. Fellows* which has been cited, was properly decided in consequence of this clause. "I also give a power to my executors to apply any part of the aforesaid legacies towards the maintenance or education of the aforesaid three children, during their minority, as in their discretion they shall think fit:" but for that clause the interest could not have been given. Mr. Moore has rightly stated the principle, \*that a legacy payable at a [\*4] future period will not carry interest, except it be given by a person *in loco parentis*; or unless there appear to be an intention on the part of the testator that it should. In the present case interest must, I think, be allowed upon the intention of the testator. He had previously devised his property to the father of the minors, who was alive when he commenced writing his will, but who died before he had completed it: and the testator, reciting that fact, says, "he felt it incumbent on him to secure for the use and support of the three younger children a certain portion of the property he bequeathed to their late father." While the father was alive, he gave him this property to enable him to provide for his children, but after the father's death he charged a certain sum on the estates for their support, that is, for their immediate support, and it is in effect a devise of so much of the real estate as will suffice to discharge that sum. In the remaining clause he devises his estate, charged with the sum of 2,400*l.* and directs it to be paid at the usual time, that is, at twenty-one; but he intended the children to be maintained, in the mean time, out of the property thus provided for them.



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Leslie v. Leslie.

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A question having arisen as to the rate of interest to be allowed on this legacy, the 204th new rule(a) was referred to, [\*5] \*by which the court rate of interest is fixed at five per cent., except in certain cases; and it was contended that that rule should be applied to the present case, in consequence of the first rule, which directs, "that after the first day of Hilary Term 1835, the several orders shall, as far as possible, be applied to all suits now pending."

Mr. Warren, *contra*.

The 204th rule cannot be applied to this case: the testator made his will antecedent to the publication of these rules, and calculated that his grandchildren should get six per cent. on the legacy he left them. In cases of wills made before the Statute for the Alteration of the Currency, legacies left by them are paid according to the value of the currency that prevailed at the time of making the will.

THE LORD CHANCELLOR:—I am afraid I cannot give more than five per cent.: the rate of interest is always in the power of the court, where no rate is fixed by the parties themselves. If the court had power to make the rule, this case must fall within it. Your argument would apply where there is an express contract, and the rate is fixed by the parties; in such a [\*6] case the court has no power to alter that contract, or vary the rate of interest; but as this is a very important question, and applies to all similar cases, I should be glad to hear any further argument from the bar upon it.

This case was not mentioned again.

"It is a general rule that legacies do not of their own nature carry interest, until default is made in payment, if of an indefinite legacy, from a year after the death of

(a) "That the court rate of interest shall be deemed to be, and calculated at five per cent., save with respect to the balances due by receivers, guardians, sequestrators, executors, administrators and trustees; and that the court rate of interest, as to such balances, shall continue to be deemed and calculated at six per cent., according to the present course of the court." Order 204, p. 133.

Ryan v. Cowley.

the testator, if made payable at a future day, then to carry interest from such time of payment." *Pett v. Fellows*, 1 Swans. 561, n.; *Heath v. Perry*, 3 Atk. 101; *Des-crampes v. Tompkins*, 4 B. C. C. 149, n.; S. C. 1 Cox, 133; *Crickett v. Dolby*, 3 Ves. 10; *Tyrrell v. Tyrrell*, 4 Ves. 1. But a legacy to an infant child by a parent, if there be no other provision for its maintenance, or by a person *in loco parentis*, carries interest from the death of the testator; *Acherley v. Vernon*, 1 P. Wms. 783; *Harvey v. Harvey*, 2 P. Wms. 21; *Conway v. Longville*, 1 E. Ca. Ab. 301, pl. 3, lit. F.; *Beckford v. Tobin*, 1 Ves. Sen. 308; *Crickett v. Dolby*, 3 Ves. 10; *Newman v. Bateson*, 3 Swans. 689. And it seems to make no difference whether the legacy be vested or contingent; *Incedon v. Northcole*, 3 Atk. 430; *Mole v. Mole*, 1 Dick. Rep. 310; *Chambers v. Goldwin*, 11 Ves. 1; *Hill v. Hill*, 3 Ves. & B. 183; *Brown v. Temperley*, 3 Russ. 263. But a legacy to a child *in ventre sa mere*, does not carry interest until the time of its birth, although the will direct that it should be computed from the day of the testator's death; *Rawlins v. Rawlins*, 2 Cox, 425. But where maintenance or interest is given by the will, and the amount or rate specified, the legatee will not in general be entitled to claim more than the maintenance or interest specified; *Hearle v. Greenbank*, 3 Atk. 716; *Mitchell v. Bower*, 3 Ves. 283; *Long v. Long*, 3 Ves. 286, n.; *Wynch v. Wynch*, 1 Cox, 433. The exception in favor of the children of the testator, and those towards whom he has placed himself *\*in loco parentis*, does not extend to adults; *Lowndes v. Lowndes*, 16 [\*7] Ves. 301; *Raven v. Waile*, 1 Swans. 553; nor to a wife, *Stent v. Robinson*, 12 Ves. 461 (overruling the dictum in *Crickett v. Dolby*, on that point); *Lowndes v. Lowndes*, 15 Ves. 301; nor to a natural child, nor to a grandchild, *Haughton v. Harrison*, 2 Atk. 330; *Butler v. Freeman*, 3 Atk. 58; *Ellis v. Ellis*, 1 Sch. & Lef. 1, nor to a nephew or niece, *Crickett v. Dolby*, 3 Ves. 10.

RYAN v. COWLEY.

1835: 16th January.

A. by his will, left a certain leasehold for lives renewable forever, and a leasehold for years, and his stock in trade, &c., to trustees, upon trust, for his daughter, for life, and after her decease "to and amongst the issue of his said daughter, lawfully to be begotten, in such shares and proportions as his said daughter should by her last will and testament appoint, *provided such child or children should arrive at the age of twenty-one years*, and for want of such issue, or in case of the death of such issue, and of the death of his wife," then over. Held, that the daughter took an estate for life only, and that the limitation over was good.

EDWARD DEACON, by his will, dated the 7th of March, 1808, devised and bequeathed to James Cowley and William Humphreys, their heirs, executors, administrators, &c., his two houses

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*Ryan v. Cowley.*

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in the city of Dublin, one held by a lease for lives renewable forever, and the other by a lease for thirty-one years, and also his stock in trade, debts, money, &c., upon trust to pay out of the rents and profits, during the life of his wife, 30% a year, to be laid out at interest for the benefit of his daughter Jane, until she should arrive at the age of twenty-one, or be married; and to permit his wife to receive the residue of said rents during her life; and in case of the death of his wife, he directed all such property, whether the produce of stock in trade or other-  
 [\*8] wise, as she should be \*possessed of at the time of her death, to be converted into money, and to be laid out at interest for the benefit and advantage of his daughter, together with the rents of said two houses (a) and that when his said daughter should arrive at age or marry, then to permit and suffer her to receive and take the said rents, issues and profits of said two houses, together with the interest of such sum and sums of money as should be then accumulated, for and during the term of her natural life, and "from and after her decease, the said rents and profits, and said interest of money, he gave, devised and bequeathed to and amongst the issue of his said daughter, lawfully to be begotten, in such shares and proportions as his said daughter should by her last will and testament appoint, provided such child or children should arrive at the age of twenty-one years, and for want of such issue of his said daughter, or in case of the death of such issue, and of the death of his wife, then he devised all his property to James Cowley and William Humphreys, for the use and benefit of their children, such children respectively to be entitled to same, share and share alike, as tenants in common."

The testator died in April, 1803, and his wife survived him only a few months, and Jane, his only child, died under age and unmarried. The bill was filed by one of the children of William Humphreys, to carry the trusts of the will into execution.

[\*9] The *Attorney-General*, for the plaintiff.

(a) *Id.*

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*Dyson v. Cowley.*

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Mr. Ball, for James Cowley.

Mr. Gilmore and Mr. Nelson, for Jane Moore, heiress at law, and sole next akin of both Jane Deacon and the testator.

The limitation here was sufficient to give the daughter, Jane Deacon, an estate tail in the freehold property. *Jesson v. Wright*; (a) and if she took an estate tail in the freehold, she was entitled to an absolute estate in the chattel property, both being included in the same limitation. 2ndly. The limitation over is too remote, being a limitation to take effect after the failure of issue generally, and is, therefore, void. In either case, the defendant, Jane Moore, is entitled to the entire property.

THE LORD CHANCELLOR:—I entertain no serious doubt upon this point. The property is partly leasehold for lives, and partly leasehold for years. The testator first gives his property to his wife for life, remainder to his daughter for life, then to and amongst her issue, in such shares and proportions as she should appoint, provided such child or children should attain the age of twenty-one years; and for want of such issue, then to the children of James Cowley and William Humphreys, share and share alike, as tenants in common. It is alleged that this limitation gave the daughter an estate tail; and for this purpose the case of *Jesson v. Wright* (b) has been relied on. I well remember that case, but I cannot consider it as ruling this point; there the gift was to the heirs of the body, and it was the clear intention of the testator to include the whole line of issue, which could only be effected by giving an estate tail, and there was no intention to devise over until the whole line of issue should fail; but here the property is given to and amongst the issue of the daughter, in such shares as she shall appoint. The term *issue* may be employed either as a word of

(a) 2 Bligh, 1.

(b) On this subject see also *Doe v. Harvey*, 4 B. & C. 610; *Right v. Creder*, 5 B. & C. 866; S. C. 8 D. & R. 718; *Merest v. James*, 4 Moore, 327; *Measure v. Gee*, 5 Bar. & Ald. 910; *Manning v. Moore*, Alc. & N. 96.

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 Prendergast v. Byre.—Spencer v. Byre.
 

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of revivor was filed by his administrator against his eldest son, a minor, who is residing out of the jurisdiction, that the suit has been revived, and the estates have been sold. Now, the question is, whether the infant heir out of the jurisdiction, is a trustee within either of the Acts of Parliament referred to. It was contended that he fell within the provisions of the Irish Act of the 28 Geo. 3, c. 85, and upon a suggestion from the court, that that Act did not apply to infants, it was answered from the bar, that the Irish Act of the 2 Geo. 1, c. 6, the provisions of which were re-enacted by the first of the King, c. 60, although the latter Act repealed the former, gave to infants the capacity to convey; and therefore the Act of Geo. 3, did enable this court to direct some person to convey for the infant. In this case I am of opinion that that argument cannot be maintained; and if a conveyance is to be executed for an infant under the first of the King, it must be in the manner and under the regulations of that Act alone. The question then is, does the late Act embrace this case? In [\*14] framing that Act I found myself \*much embarrassed by the case of an infant mortgagee entitled to the mortgage money, for no former Act had provided how the money was to be paid and secured for the infant. The 14th and 15th sections were framed with a view to obviate this difficulty. *In re Goddard*, (a) a petition was presented after the death of the mortgagee by the mortgagor, and it sought a reconveyance by some person in the place of the unknown heir of the mortgagee, who had died intestate, on payment of the money to his, the mortgagee's, personal representative. The late Master of the Rolls held that the mortgagee was not a trustee, and therefore that the case did not fall within the 8th section of the 1 Wm. 4. With that decision I entirely concur; indeed the Master of the Rolls consulted me (as the framer of the Act) on the point, before he pronounced his decision. Now does that case decide the present? I think not. The 8th section of the 1 Wm. 4, provides in words for the case of a mortgagee as well as of a trustee. (b) The 8th section

(a) 1 Myles & Keen, p. 24.

(b) 1 Wm. 4, c. 60, sec. 8, enacts, "That where any person seized of any land upon any trust shall be out of the jurisdiction of, or not amenable to, the process of the

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Prendergast v. Byre.—Spanner v. Byre.

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speaks \*only of trustees. The words are: "Where any [\*15] person seised of any land upon any trust, &c.;" and the 18th section(a) enacts (subject to certain exceptions) that the several provisions therein contained shall extend to every other case of a constructive trust, or trust arising or resulting by implication of law. It appears to me that this case falls within those provisions. In a case like *Ex parte Goddard*, it was not the intention of the legislature to enable the court in this summary manner to divest a man in his absence of an estate actually descended to him as heir at law of a mortgagee; for if he were present he might be \*enabled to show, that he [\*16] himself was entitled to the mortgage money, or even to the estate itself, discharged of all right of redemption; but in this case the mortgagee himself, under whom both the real and personal representative derive, filed the bill, and the decree for sale was made in his lifetime. That decree converted him, as to the legal estate in the property, into a trustee, and his real representative cannot stand before the court in any other character. The

Court of Chancery, or it shall be uncertain, where there were several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised as aforesaid, be living or dead, or, if known to be dead, it shall not be known who is his heir; or if any trustee seised, as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution, by or by an agent duly authorized by any person entitled to require the same; then and in every or any such case it shall be lawful for the said Court of Chancery to direct any person whom such court may think proper to appoint for that purpose, in the place of the trustee or heir, to convey such land to such person and in such manner as the said court shall think proper; and every such conveyance shall be as effectual as if the trustees seised as aforesaid, or his heir, had made and executed the same."

(a) 1 Wm. 4, c. 60, sec. 18, enacts, "That the several provisions hereinbefore contained shall extend to every other case of a constructive trust, or trust arising or resulting by implication of law; but in every such case where the alleged trustee has or claims a beneficial interest adversely to the party seeking a conveyance or transfer, no order shall be made for the execution of a conveyance or transfer by such alleged trustee, until after it has been declared by the Court of Chancery, in a suit regularly instituted in such court, that such person is a trustee for the person so seeking a conveyance or transfer; but this Act shall not extend to cases upon partition, or cases arising out of the doctrine of election in equity, or to a vendor, except in any case hereinbefore expressly provided for.

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In the Matter of Nicholls, Minors.

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infant heir, therefore, is in my opinion a trustee within the 8th and 18th sections of the Act. The case falls within the principle, and is embraced by the words of the Act, and is not, I think, open to the objections which properly prevailed in *Ex parte Goddard*. But the mere order of revivor does not prove the facts stated in the petition, nor shall I examine them by affidavit in this place. It must be referred, therefore, to the Master, to inquire whether the infant is a trustee within the Act, and whether he is out of the jurisdiction of the court; and I direct the petition to confirm the Master's report to come on before me, and that the evidence may be in court.

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\*IN THE MATTER OF NICHOLLS, MINORS. [\*17]

1835: 31st January.

The court will not appoint new trustees under the 1 Wm. 4, c. 60, s. 22, except in plain cases.

THE petition of Patrick and Simon Nicholls (the uncles and guardians of the minors) stated, that in pursuance of articles of the 6th of January, 1816, entered into on the marriage of A. Nicholls with Mary his wife, a certain bond with warrant was executed to M. A. Lyster, as sole trustee under the said articles, for the purposes and upon the trusts therein mentioned; that afterwards judgment was entered on the said bond; that the said articles were never executed by the said M. A. Lyster, and that he never had any knowledge of his having been appointed trustee, or of the said bond having been executed to him, or judgment entered thereon. That the said M. A. Lyster died in the year 1817, and by his will appointed T. Ellis, C. Lyster, and W. O'Reilly, his executors, who never acted in the trusts of the said articles. That A. Nicholls died in 1821, and Mary his wife in 1826, leaving three children, the minors, then surviving. That petitioners (the uncles of the said minors) were by an order of the court appointed the guardians of their persons and fortunes.

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In the Matter of Nicholls, Minors.

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That a large arrear of interest having accrued due on said bond, petitioners applied to the executors of the said M. A. Lyster, either to allow proceedings to be taken in their names on the said bond for the recovery of the amount thereof, or to assign the judgment obtained thereon to a trustee for the said minors, but that the said \*executors refused to act in any [\*18] manner in the trusts of the said marriage articles, or to assign the said judgment unless directed to do so by this court; and that unless proceedings should be taken the amount of the said bond would be wholly lost. The petition then prayed that the petitioners might be appointed trustees in the place of the said M. A. Lyster, and that the executors of the said M. A. Lyster might be directed to assign the said judgment to the petitioners.

Mr. P. *Murphy*, for the petitioners.

THE LORD CHANCELLOR:—I have desired these petitions to be moved before me, as I consider this Act would be most injurious unless cautiously applied. The petition states that the trustee has been appointed many years back, and has never acted, and I am called upon to appoint new trustees, although there is no power to do so in the instrument creating the trust, and no bill has been filed. The Act was not intended to apply to such a case. There may have been all sorts of dealing with this property, and parties might come in in this way, alleging that the trustee had never acted, and so take away the property. I consider that the 22d section(a) applies to plain cases

(a) 1 Wm. 4, c. 60, sec. 22, is as follows, "Whereas cases may occur upon applications by petition under this Act for a conveyance or transfer, where the recent creation or declaration of the trust or other circumstances, may render it safe and expedient for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery (as the case may require) to direct by an order upon such petition, a conveyance or transfer to be made to a new trustee or trustees, without compelling the parties seeking such appointment to file a bill for that purpose, although there is no power in any deed or instrument creating or declaring the trusts of such land or stock to appoint new trustees; be it, therefore, further enacted, that in any such case it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the said Court of Chancery, to appoint any person to be a new trustee, by an order to be made on a petition to be



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In the Matter of Fitzgerald.

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[\*19] only; as for instance, to \*the case of a recent trust, created within ten years, or a simple trust for A., for her separate use for life, remainder to B. in fee, where the trustee has died or gone abroad, and no question could arise; but as to applying the Act to all cases where there has been a want of providence in the parties, I will not do so; I have no such power under the Act. I request that no more such petitions be presented, as I can make no order upon them. I do not think it necessary to consider whether this case falls at all within the Act.

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[\*20] \*IN THE MATTER OF GERALD FITZGERALD.

1835: 31st January.

The court will not appoint a new trustee under the 22nd section of the 1 Wm. 4, c. 60, where no bill has been died, and there is no power to do so in the instrument creating the trust, unless a disability exist such as is pointed out by the previous sections of the Act, viz., infancy, lunacy, &c.

Before the court has jurisdiction under the 22nd section, there must be a case where the party might apply by petition, under the former sections of the Act.

THE petition stated that, on the 26th of June, 1813, a settlement was executed on the marriage of G. Fitzgerald (the petitioner), whereby a certain sum secured by the bond and warrant of the said G. Fitzgerald, was vested in J. Jocelyn and D. O'Brien as trustees, upon certain trusts therein mentioned; that said trustees accepted the trust, and that one of them, J. Jocelyn, died on the 28th of January, 1828, leaving his co-trustee him surviving; and that petitioner was desirous to appoint G. Johnston a trustee in the place of the said J. Jocelyn.

presented for a conveyance or transfer under this Act, after hearing all such parties as the said court shall think necessary, and thereupon a conveyance or transfer shall and may be made and executed according to the provisions hereinbefore contained, to or so as to vest such land or stock in such new trustee, either alone or jointly with any surviving or continuing trustee, as effectually and in the same manner as if such new trustee had been appointed under a power in any instrument, creating or declaring the trusts of such land or stock, or in a suit regularly instituted."

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In the Matter of Fitzgerald.

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The petition then prayed that, under 1 Wm. 4, c. 60, sec. 10, G. Johnston might be appointed a trustee in the room of the late J. Jocelyn.

Mr. *Hutton*, for the petitioner.

This is a case certainly within the Act; the trustees have accepted the trust, and the Act contemplates the case of a surviving trustee.

3d February.—THE LORD CHANCELLOR:—I at first expressed an opinion that this case was not provided for, and that the court had no jurisdiction unless in the cases pointed out by the Act; and I dismissed the petition; but on Mr. *Hutton*, who moved the matter, \*expressing a strong opinion that this [\*21] case was within the Act, I took back the petition, in order to have an opportunity of reconsidering it. The petition states that a marriage settlement was executed in 1813, and that a certain property was vested in trustees for the common purposes. There is no power in the settlement to appoint new trustees. The trustees accepted the trust, and one of them, the Honorable J. Jocelyn, died in January, 1828. The petitioner, Mr. Fitzgerald, states that he is desirous to have Mr. Johnston appointed a trustee in the room of the Honorable J. Jocelyn, and prays that, under 1 Wm. 4, c. 60, sec. 10, it may be referred to one of the Masters to approve of a new trustee. That section does not touch this case, and accordingly the counsel at the bar relied on the 22d section. Now it is perfectly clear that this case is not within that section. [His Lordship here read the 22d section.](a) The mistake has arisen from not attending to the words in the beginning of this section. "And whereas, cases may occur upon applications by petition under this Act, &c." Before the court ever has jurisdiction, there must be a case where the party might apply by petition under the former sections of the Act; that is, in cases of disability by reason of infancy, lunacy, &c. There must be a disability, and of the sort

(a) Vid. p. 18, n. ante.

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In the Matter of Fitzgerald.

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pointed out by the Act; if you have a right to apply under the former sections, this section enables the court to appoint new trustees, although no bill has been filed, and although there is no power in the instrument creating the trust. If a

[\*22] \*disability exist, to whom is the estate to be conveyed?

Either to trustees appointed under a power in the settlement itself, or to trustees appointed by a court of competent jurisdiction in a suit, or by the court under the 22d section of this Act. But no general authority exists in this court to appoint new trustees where there is no power in the settlement, unless where a bill is regularly filed. Many orders, I am informed, have been made, as of course, under this section, granting a reference to the Master, and reports have been obtained, and orders made confirming the reports. These orders are absolutely waste paper, and have no legal validity under the Act. They will, I fear, very much embarrass titles. The principle, I suppose, on which those orders have been made, is, that this Act provides for the substitution of trustees without a bill being filed, or without any power to appoint new trustees being contained in the instrument creating the trusts, and that the court can appoint new trustees under the 22d section. I am clearly of opinion that such cases are not within the words, and certainly not within the intention of the Act. The Act gives no jurisdiction to this court unless a disability exists. The deed contains no power, and I have no more authority to appoint new trustees in this case, than any of the gentlemen I am now addressing, and I consider all former orders made upon such petitions as absolutely void. At the bar, when petitions of this description were sent to me, I have refused to open them, as not being within the Act. This point has been so ruled over and over again in England, and it is now a settled point, and I

[\*23] hope it will be so \*considered here. I am not sorry for this opportunity of explaining my opinion on the construction of this Act, and any person presenting such a petition in future, will have to pay the costs of it himself. The petition must be dismissed.

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Whitley v. Fishbourne.

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## WHITLEY v. FISHBOURNE.

1836: 31st January.

The court will not appoint new trustees under the 1 Wm. 4, c. 60, s. 22, except in a plain case, or where there has been a recent creation of trust, and the court has jurisdiction by reason of disability or the like. The insecure nature of the property is no ground for the interference of the court.

THE petition which was presented by Patrick Whitley and Sarah his wife, stated that William Barton (deceased) being entitled to certain judgments obtained against George Rothe, and also to four bonds of the said George Rothe for 500*l.* each by a deed of settlement of the 17th of January, 1821, covenanted with the trustee, William Fishbourne, that he the said William Barton, his executors, &c., would cause judgments to be entered on the said four bonds, and assign the same (together with two other judgments already obtained against the said George Rothe) to the said William Fishbourne, upon trust, as to a moiety of the principal and interest thereof, to the use of the petitioner Sarah; and as to the other moiety to the use of William Barton, his then son, and the child of which the petitioner Sarah was then *enciente*; and that this deed was never executed by Fishbourne, the trustee. The petition further stated, that the said George Rothe was, at the time of the execution of the said deed, indebted to the said Barton in a further sum of upwards of \*2,000*l.* and the said George Rothe being also in great [\*24] distress, the said William Barton (subsequently to the execution of the said deed) agreed to cancel all the said bonds, and to take in lieu thereof five joint and several bonds of the said George Rothe, and Richard Rothe (his son), to secure a principal sum of 2,300*l.*, on which separate judgments were duly entered against the said George and Richard Rothe; that the said George had become an insolvent, and his property had been sold to pay prior debts; that by five separate deeds of assignment, bearing date the 18th of April, 1822, the said William Barton assigned the said several judgments to the said William Fishbourne, for and upon the several trusts declared in the deed of the 17th of January, 1821; that these deeds were never exe-

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Whitley v. Fishbourne.

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cuted by Fishbourne: that William Barton, afterwards intermarried with the petitioner, and died on the 22d April, 1823, leaving the petitioner his widow, and two sons, him surviving: that William Barton, by his will of the 20th April, 1822, devised all his estates to the petitioner, as trustee for his children, and appointed her guardian of their persons and fortunes, and nominated Robert Mulhallyan executor, and the petitioner Sarah, executrix of his will: that on the 4th of November, 1823, petitioner intermarried with Patrick Whitley, who in right of his wife became entitled to a moiety of the said sum of 2,300*l.*; that Fishbourne had been applied to, and expressly refused to act in the trusts of the said deeds of 1821 and 1822. The petition further stated, that if immediate steps should not be taken, there would be great danger of the [\*25] said sum of \*2,300*l.* being wholly lost, as the said R.

Rothe was in very limited circumstances, his only property being a life interest in a church benefice, and that he was otherwise indebted to a large amount. The petition then prayed, that the petitioners might be appointed trustees under the said deed of the 17th January, 1821, in place of the said William Fishbourne; and that, if necessary, it be referred to the Master to settle a proper deed of assignment, and that the said William Fishbourne be directed to assign to the petitioners the said several judgments.

It appeared that the settlement of 1821 contained no power to appoint new trustees.

Mr. *W. Berwick*, for the petitioners.

This comes within the provisions of the 22d section of the 1 Wm. 4, c. 60; the fund is of a perishable nature, and unless some means be taken to make these judgments available, the whole will be lost, as the only security is the life interest of the Rev. R. Rothe in a church benefice. The parties who seek to be appointed new trustees are beneficially interested, and the lady is a trustee, and also guardian of the children under the will of her late husband.

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In the Matter of Anderson.

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*Mr. Brewster, for the respondent.*

In this case a bill has been already filed against this lady, as executrix of her husband, charging her with a devastavit.

\*THE LORD CHANCELLOR:—All the Act does, is to [\*26] give the court authority to make an order appointing new trustees, if the court should see its way, and has jurisdiction by reason of a disability or the like. If there be a power in the original instrument, or if a bill be filed for the purpose, the court may direct a transfer to the trustees appointed under the power or by the court in the suit. But then there may be so very plain a case, as that this court may appoint new trustees, although no suit has been instituted, or no power be contained in the original instrument creating the trusts. The 22d clause was framed to meet such a case. The Act was intended to apply to a plain case without any ambiguity, or to the case of a recent creation of trust; whereas this, if even within the provisions of the Act, is a complicated case. I will not extend the provisions of the Act to this case, and I should not in any case of this nature make an order without a reference to the Master. The present application is for the purpose of securing a fund, which is in danger of being lost; that is not the object of the Act; the insecure nature of the property weighs nothing with me. It appears that there actually is a suit depending with reference to these funds, and in that suit the property may be protected, and the rights of the parties secured. That fact proves how dangerous it is to interfere in these cases without full inquiry. I cannot refer this matter to the Master.

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\*IN THE MATTER OF ANDERSON.

[\*27]

1835: 9th February.

The court refused to appoint new trustees under the 1 Wm. 4, c. 60, in the room of trustees who had died, where the trust property consisted both of stock and real estate, no administration having been taken out to the survivor of the said trustees (who died intestate), and his heir at law being out of the jurisdiction.

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 In the Matter of Anderson.
 

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It was not intended by the 9th and 10th sections to supply the want of a personal representative of a trustee of a chattel interest, or stock.

THE matter of this petition is fully set forth in the Chancellor's judgment.

THE LORD CHANCELLOR:—In this case there was a settlement of personal estate which was vested in two trustees upon trust to lay it out in the purchase of land, and to permit the petitioner to receive the interest of the money, as well as the rents and profits of the land during his life, but in case of his death, bankruptcy or insolvency, during the life of his wife; then to her for life: and in case there should be a child or children living at the time of the death of the survivor, or of the bankruptcy or insolvency of the petitioner, then the stock or land was to be conveyed by the trustees to such child or children. The children, therefore, had a contingent interest. Part of the stock was invested in real estate. The two trustees have both died; the survivor abroad; intestate it is said, but no administration has been taken out to him; and it is stated that it is not likely that any will be. There is no power in the settlement to appoint new trustees; and the heir at law of the surviving trustee being abroad, in the East Indies, the petitioner desires the court to appoint new trustees. If we look at the Act, we shall find that it gives jurisdiction only where there is a disability in the trustee to convey.

[\*28] Certain \*cases are provided for by the 8th section, of persons being out of the jurisdiction, or the like. The early sections show *by whom* the conveyance is to be made. The 11th section points out *to whom* it is to be made—either to the person beneficially entitled, or to trustees appointed by virtue of a power in the instrument creating the trust, or by the Court of Chancery, that is in a suit regularly instituted; but then section 22, enables the court in certain cases summarily to appoint new trustees, although there is no power in the instrument, and no bill has been filed for the purpose. Section 8(a) enacts, "that when any person seised of any land upon any trust shall be out of the jurisdiction, &c.," the court may direct a conveyance

(a) Vid. p. 14, n. ante.

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Trimleston v. Kemmis.

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to such person as the court shall think proper. The difficulty I have in this case is, that stock as well as land is sought to be conveyed. Section 8, refers to land generally; section 9, to land held for terms of years, which clause was purposely altered to make a distinction between the case of a real and a personal representative. As it was not intended to render administration unnecessary, by supplying a personal representative, but to provide only for the want of a real representative, because there was no other way of supplying such a representative. The 9th section, therefore, does not supply the want of a personal representative of a trustee of a chattel interest, and section 10 is just the same. Now, this is a case where a trustee of stock has died, and no personal representative has been obtained. There is no clause in the Act to provide for such a case. You \*must go to the Ecclesiastical Court, and even when you [\*29] have a personal representative, you cannot come here to have a new trustee appointed under this Act, because the trustee will be under no disability. It will be necessary, therefore, to file a bill to supply the defect in the settlement, and as you must file a bill to appoint new trustees of the personal estate, and of course the same persons must be trustees of both the properties, I shall make no order appointing a new trustee of the realty. I will not appoint a trustee in an irregular manner, when I know that there must be trustees appointed in a regular way, who, when properly appointed, will be entitled to ask for a conveyance.

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TRIMLESTON v. KEMMIS.

1835: 17th January.

Plaintiff filed his bill to set aside leases as unduly obtained, and pending the equity suit brings his ejectment upon a paramount title, after upwards of nineteen years' adverse possession, for recovery of the same lands; the court, upon his undertaking to try the ejectment on the paramount title only, refused to put him to his election.

NICHOLAS Lord Trimleston, by indentures bearing date respectively the 24th of September, 1798, and the 14th of October,



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*Trimleston v. Kemmis.*


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1799, demised to Thomas Kemmis, who was then acting as his solicitor and agent, certain premises for long terms of years. In 1818 Nicholas Lord Trimleston died, and was succeeded by his son Thomas, who on the 14th of October, 1818, filed his original bill, impeaching the leases granted by Nicholas, his father, as unduly procured by Thomas Kemmis, and praying for an account. Thomas Kemmis having died, a supplemental bill was filed on the 19th of October, 1824, by Thomas Lord Trimleston [\*80] and ——— Roohfort, administrator to \*Nicholas the late lord, as coplaintiffs, against William Kemmis, the executor of Thomas Kemmis, and Henry Kemmis, his son, who claimed a certain interest in said leaseholds by virtue of a settlement executed on his marriage in the year 1804, praying (amongst other things) that the said leases might be declared unduly and improperly obtained, and for an account of the consideration paid by Thomas Kemmis for the said leases, and of the rents and profits of the lands comprised therein. In the year 1833, pending said suit, Thomas Lord Trimleston, claiming under an old family settlement long prior to said leases, brought his ejectment on the title for the recovery of the lands of Reebuck, including the premises comprised in the said leases; to which ejectment defence was taken by Henry Kemmis for that portion of the lands comprised in the leases made to his father. On the 18th of June, 1833, the common order of reference was obtained, and on the 21st of June, 1834, the Master made his report thereon, finding that the proceedings of the plaintiff, Thomas Lord Trimleston, at law and in equity, were, so far as the defendant Henry Kemmis was concerned, for the same matters. On the 12th of July, 1834, the plaintiff, Lord Trimleston, made an application in the Rolls to set aside the Master's report; and at the same time the defendant Henry Kemmis moved that the plaintiff Lord Trimleston should be obliged to elect, whether he would proceed at law or in equity; and in case he should elect to proceed at law, that his bill should be dismissed with costs as against the said Henry Kemmis; and in case he should [\*31] elect to proceed in equity, that he \*might then be restrained from proceeding further in the ejectment. The

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*Trimleston v. Kemmis.*

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Master of the Rolls made no rule on either of these applications; but without prejudice to the defendant, Henry Kemmis, applying to stay proceedings in this court pending the ejectment. And from this order both parties now appealed.

*The Attorney-General*, for the defendant.

*Mr. Farrell*, and *Mr. Ball*, for Lord Trimleston.

This is not the ordinary application to put a party, who is plaintiff both at law and in equity, to his election, for in this case the sole plaintiff at law is only a coplaintiff in the equity suit; the defendants also in the two suits have different rights, so that the proceedings, so far from being the same, differ in every essential feature; at law we rely on a paramount title, but in this court we are seeking to set aside the leases as unduly and improperly obtained, and for an account of mesne rates, so that the ejectment and the equity suit are quite distinct, and are founded on two distinct sets of documents; whereas, the case of election can only arise where the same question is to be decided, and the same relief is sought at one and the same time in different courts; besides, if the plaintiff succeeds at law, the defendant would be accountable for the mesne profits only for six years previous; whereas, in equity we should be entitled to the account of the rents for the whole period. Our ejectment was brought pending the equity suit, because in \*a few months the [\*32] right to recover at law would have been barred by the Statute of Limitations, and in proceeding on that ejectment we shall rely solely on our paramount title. *Dormer v. Fortescue*, (a) was cited.

*Serjeant Greene*, in reply.

The defendant here has a right to compel the plaintiff to adopt finally either the proceeding at law or in equity; Lord Redesdale in his Treatise on Pleading, (b) states the rule as to election

(a) 3 Atk. 129.

(b) p. 249, 4th ed.

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Trimleston v. Kemmis.

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thus, "if a plaintiff sues a defendant at the same time for the same cause, at common law and in equity, the defendant after answer put in, may apply to the court that the plaintiff may make his election where he will proceed." It is only necessary that the two proceedings should be substantially for the same purpose, although it has been attempted to cut down the rule to identity of title; but that is not possible, for the legal title can never be identically the same with the equitable, it is sufficient if the purpose for which the proceedings are instituted in each is the same. The primary object of each of these suits is to get the possession of the same estate, and where the object is substantially the same in each, the party must elect. *Hogue v. Curtis.*(a) In *Mills v. Fry.*(b) Lord Eldon puts the very case, that a person suing for the possession of the premises by a receiver, is not at liberty to bring any action to obtain the possession. In one [\*33] view of the case \*a court of law can put the plaintiff into possession; but in another view of the case a court of equity can do the same, so that the plaintiff can have the same relief in each suit, and that is the true test by which this question ought to be tried. If the plaintiff be allowed to proceed at law until the result of such proceeding is known, election becomes a dead letter; he must choose his tribunal in the first instance. In ejectment the plaintiff never states his title, but may recover on any title; he may therefore rely upon his equitable title in the court of law.

THE LORD CHANCELLOR:—Upon counsel for the plaintiff undertaking in open court to try the ejectment upon the paramount title only, I shall not vary the order of the Master of the Rolls. The general rule is that a defendant shall not be doubly vexed; but my difficulty in this case is, that if I stop the proceedings at law, I may prevent the plaintiff from succeeding on a title not in contest in this court. The question in this court is, assuming these leases to have been legally granted, has the plaintiff a right to set them aside as unduly and improperly obtained? It is clear

(a) 1 J. & W. 429.

(b) 19 Ves. 278; S. C. Cooper, 107; 3 V. & B. 2.

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that if I stop the proceedings in the ejectment I shall prevent Lord Trimleston from being able to recover at all, if his proceedings in equity should be unsuccessful; but if he should not succeed at law, he would be entitled to file a new bill, for although defeated at law, his equity to set aside the leases would remain unimpeached. Each \*proceeding certainly is for [\*34] the recovery of the possession; so far, therefore, there is an identity between the proceedings at law and in equity: but the question at law is not the question in controversy in this court. I cannot disturb the order of the Master of the Rolls. I shall not however give any costs on account of the undertaking which I have required, and which has been complied with.

Reg. Lib.—“the plaintiff Lord Trimleston, by his counsel at the bar, undertaking not to proceed at law under the said ejectment on any other than on paramount title, affirm the Rolls order. the parties to abide their own costs of this motion.”

The court will modify the rule according to circumstances; *Carrick v. Young*, 2 Swans. 243. In general there is a reference to ascertain whether the suits are for the same matter; *Boyd v. Heinzelman*, 1 V. & B. 381. But not if there are sufficient facts before the court to enable it to form an opinion; *Mills v. Fry*, 3 V. & B. 9, Anon. 2 Mad. 395. After a decree an injunction against proceeding at law will be granted without a reference; *Mocher v. Reed*, 1 B. & Bea. 320; *Wilson v. Wetherherd*, 2 Mer. 406; *Bell v. O'Reilly*, 2 Sch. & Lef. 430. Plaintiff cannot be compelled to elect until a complete answer has been put in and the time for filing exceptions has expired; *Broune v. Poyntz*, 3 Mad. 24; *Coupland v. Bradock*, 5 Mad. 14. A mortgagee is not bound to elect; *Rees v. Parkinson*, 2 Ans. 497; *Schoole v. Sall*, 1 Sch. & Lef. 176; *Burnell v. Martin*, 2 Doug. 417; *Booth v. Booth*, 2 Atk. 342; *Lyster v. Dolland*, 1 Ves. Jun. 431.

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\*TURKINGTON v. KEARNAN.

[\*35]

1835: 20th January.

R. G. on the marriage of his daughter with R. T., by a settlement of 1816, conveyed certain premises held under a lease for three lives or forty-one years, upon trust to raise 500*l.* and to pay the interest thereof to R. T. during the joint lives of R. T.

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and wife, and after his decease to his wife as jointure, and after her decease to pay the principal to the issue of the marriage; and it was agreed that said sum of 500*l*. should remain a charge on said lands for six years, and then be raised out of the rents at the rate of 50*l*. per annum with interest. R. G. having become indebted to O. K. on the 23d of January, 1822, with the concurrence of R. T. and wife, granted to him a rent-charge of 50*l*. a year out of a part of the said premises until the debt should be paid off; and, also, on the same day, with the like concurrence of R. T. and wife, demised to him the remainder of the said premises at a rent of 50*l*. a year, to be retained until he should be paid off; and in 1823, in consideration of a further sum, mortgaged to O. K. the said last mentioned premises. Held, that the settlement of 1815 could not be viewed as a mortgage, and that O. K. having dealt with the estate with notice of that settlement, was accountable for the by-gone rents from the period at which he entered into the possession. Held, also, that as the interest in the premises depended on one old life, there should be a decree for immediate payment.

Although the bill may be dismissed, so far as it seeks to set aside a lease made to the defendant which permitted waste, and which is a good lease as against the lessor, yet it is within the province of the court while the sum due to the plaintiff remains unpaid, to prevent any waste which may tend to injure their security.

THE Rev. R. Gooldsbury being entitled to the lands and mill of Killeen, under a lease of the 18th of November, 1791, for three lives or forty-one years, by a settlement of the 2d of November, 1815, executed on the marriage of his daughter Catherine with R. Turkington, conveyed the said premises to trustees, upon trust out of the issues and profits thereof to raise 500*l*. (the marriage portion of the said Catherine), and to permit said R. Turkington to take out of the issues and profits, during the joint lives of himself and the said Catherine, an annuity of 30*l*. a year in lieu of interest on the said sum of 500*l*. and as to the remainder of the issues and profits, for the sole use of the said R. Gooldsbury, his heirs and assigns; and by the said deed it was further provided, that in case the said Catherine should survive her husband, she should take the said annuity of 30*l*. as [\*36] jointure, and after her decease that the said sum of 500*l*. should go to the issue of the marriage, and in default of issue to the said R. Turkington, his executors and administrators: and it was then declared that the said sum of 500*l*. should remain a lien and charge upon the said premises for a period of six years from the date thereof, and if not paid by the said R. Gooldsbury, his heirs, &c., prior to or upon the expiration of the

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said period, then that the said sum of 500*l.* should be called in and paid out of the issues and profits, at the rate of 50*l.* per annum until the whole of said sum with interest should be fully paid off.

By a deed of 23d of January, 1822, made between the said R. Gooldsbury of the first part, R. Turkington and Catherine his wife of the second part, and Owen Kearnan of the third part, after reciting the settlement of the 2d of November, 1815, and that the said sum of 500*l.* was a charge on the said lands, and also reciting that R. Gooldsbury was indebted to Owen Kearnan in 354*l.* in order to secure the payment thereof, the said R. Gooldsbury granted to Owen Kearnan a rent charge of 50*l.* a year payable out of the mill and mill holding, part of said premises of Killeen, until said sum of 354*l.* with interest should be paid off. And the said R. Turkington and Catherine his wife agreed that the said sum of 500*l.* should not be called in, but remain a charge on said premises, until the sum so due to Owen Kearnan should be fully paid off.

\*By another deed of the same date entered into be- [\*37]  
tween R. Turkington and wife of the first part, the trustees of the settlement of 1815 of the second part, and Owen Kearnan of the third part: it was agreed that the said Owen Kearnan should occupy and possess said lands of Killeen until the sum due to him should be paid off and discharged.

By a lease of the same date, the said R. Gooldsbury demised said lands of Killeen to Owen Kearnan for a term of eleven years from the 1st of November, 1821; subject to the yearly rent of 50*l.* over and above the head rent; which lease contained a covenant prohibiting Owen Kearnan from breaking up more than four acres of the said lands; and also provided, that said Owen Kearnan should retain said 50*l.* yearly, until the said sum of 354*l.* with interest should be paid.

By a further deed of the 4th of January, 1823, made between R. Gooldsbury of the first part, R. Turkington and wife and the

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trustees of the said settlement of 1815, of the second part, and Owen Kearnan of the third part, in consideration of a further sum of 40*l.* 8*s.*, R. Gooldsbury conveyed to Owen Kearnan all his interest in said lands of Killeen, until the said sums of 354*l.* and 40*l.* 8*s.* and all interest due thereon should be paid off.

The said R. Gooldsbury died in February, 1829, and  
[\*38] \*devised the said lands to his sons Robert and Francis, share and share alike. By a lease of the 28th of October, 1830, the said Robert and Francis demised the lands of Killeen to Owen Kearnan, with liberty to till and break up such part of the said lands as he might think proper: and by another lease of the 15th of December, 1831, they demised the mill to Robert and Alexander Wallace. The bill was filed on behalf of the minor children of R. Turkington against Owen Kearnan, the trustees of the settlement, Turkington and wife, and Robert and Alexander Wallace, and prayed for an account of the sum due on foot of said charge of 500*l.*, and that the sum found due might be lodged in court, as to the principal, for the use of the plaintiffs, and as to the interest, for such persons as might be found entitled thereto; and in default of payment that the said premises or a competent part thereof might be sold, and, if necessary, discharged of said lease alleged to have been made to Owen Kearnan, and also discharged of said conveyance to Robert and Alexander Wallace; and that same might be declared fraudulent and void as against the plaintiffs, and that pending the cause a receiver might be appointed; and in case said lease and said contracts between R. Gooldsbury and Owen Kearnan, should not be deemed fraudulent and void as against the plaintiffs, then, that an account might be taken on foot of said rent charge and lease, and of all sums said Owen Kearnan had received, or without wilful default might have received out of said lands, and if a balance should be found due to him, that he might be  
[\*39] directed to give up possession of \*the premises upon payment of the same, and that an injunction might issue to prevent the said Owen Kearnan from breaking up any part of the said lands.

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By the decree pronounced in the cause on the 4th of July, 1834, it was, amongst other things, decreed that the defendant Owen Kearnan should account with the plaintiffs for 50*l.* a year, late currency, from the 23d of January, 1822, and that he should be liable to pay to them the sum reported due on foot of said account. And it was further ordered that a receiver should be appointed, and that the injunction, under a certain order of the 9th of July, 1832, should be continued; and as to Robert and Alexander Wallace, that the bill against them should be dismissed without costs; and as to Owen Kearnan, that the bill against him should also be dismissed without costs, so far as it seeks to set aside the lease of the 28th of October, 1830; and, as between the plaintiffs and Owen Kearnan, that they should respectively abide their own costs to the time of the decree. The cause came on to be reheard at the instance of the defendant Owen Kearnan, who objected to the decree on several grounds; first, that he ought not to have been held accountable for the 50*l.* a year for any period previous to the filing of the bill, and that the sum found due by him ought not to have been decreed to be paid to the plaintiffs, but to the trustees of the settlement of the 2d November, 1815. Secondly. That the Master should have been directed to take such account without calculating interest on said sum of 500*l.*, and that \*he [\*40] (Owen Kearnan) should have been declared entitled to stand in the place of R. Turkington, and to receive the interest on said sum of 500*l.* during the life of the said R. Turkington, until he should be paid the sums he should be obliged to pay in this cause on account of said sum of 500*l.*, together with the said sums of 354*l.*, and 40*l.* 8*s.*, and interest thereon. Thirdly. That a receiver should have been appointed only in case he (the said Owen Kearnan) should fail to pay such sum as he should be decreed to pay on foot of said sum of 50*l.* a year, and that the injunction should have been continued only until payment of such sum as he should be decreed liable to pay on foot of said sum of 500*l.*, and that he (the said Owen Kearnan), on payment of 500*l.*, should have been declared entitled to retain the future accruing rent payable by him, by virtue of the deeds of 23d of



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January, 1822, and 4th of January, 1823, until he should be reimbursed whatever sum he should have to pay on foot of said sum of 500*l.*, and also the sum due to him on foot of said sums of 354*l.*, and 40*l.* 8*s.* and interest thereon.

Mr. *Litton* and Mr. *J. Brooke*, for the plaintiffs.

The defendant Owen Kearnan, had full notice of the settlement of 1815, and must therefore have taken subject to the trusts of that settlement. The settlor's interest in the premises was for three lives or forty-one years, and as the term of years has expired, and the lives are old, the property must be sold to raise the charge, otherwise the security may fail before [\*41] the sum of 500*l.* can be raised \*by annual payments.

With respect to the objection to the decree, that it directs the sum to be paid to the plaintiffs, who are minors, and not to the trustees of the settlement; that is mere matter of form, and the court will take care that the money is paid into the proper hands.

The *Attorney-General*, Mr. *Keating*, and Mr. *Wm. Brooke*, for the defendant, Owen Kearnan.

The settlement of 1815, which provided that the 500*l.* should remain a charge on the estate for six years, and then be raised out of the rents at the rate of 50*l.* a year, is nothing more than a mere mortgage to the trustees of the settlement. The defendant Owen Kearnan now stands in Gooldsbury's place, and if Gooldsbury, the mortgagor, had himself continued in the possession, he never could have been made accountable for the by-gone rents. *Gresley v. Adderley*,<sup>(a)</sup> and *Thomas v. Brigstocke*.<sup>(b)</sup> *Higgins v. York Building Company*.<sup>(c)</sup> The latter was a much stronger case than the present, being a case of actual and not merely constructive fraud, which is the utmost to which this case can be pushed. Kearnan went into possession as mortgagee, and the court will not now compel him to refund; the plaintiffs have the accruing

(a) 1 Swans. 573.

(b) 4 Russ. 64.

(c) 2 Atk. 107.

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rents and also the *corpus* of the estate, and by means of a receiver or a sale can satisfy their charge, and when the \*court can adopt these modes of payment, it will not [\*42] compel a puisne mortgagee to refund rents which he has received during a period of actual possession, while the trustees of the settlement (the prior mortgagees) stood by and permitted him to do so. R. Turkington was a party to the mortgage by way of rent charge from Gooldsbury to Kearnan, and Kearnan has thus become entitled to stand in Turkington's place, and therefore has a clear vested right in the interest of the sum of 500*l.*, to the principal of which the plaintiffs are entitled, only on the death of Turkington and wife, but not to any account on foot of the interest. In 1830, an occupation lease, at a fair rent, was made by the representatives of the mortgagor, containing an express covenant that the lessee might be at liberty to till and break up any portion of the land, notwithstanding any covenant in the former lease, and as the decree has established that lease, the injunction should not be continued. The decree is erroneous, in appointing the receiver for an indefinite period, and in omitting to make provision for the payment of Kearnan's demand. Moreover, the relief prayed by the bill is inconsistent, in seeking to set aside the lease of 1830, as fraudulent against the plaintiffs on the ground of undervalue, and at the same time in praying for an account on foot of that lease.

THE LORD CHANCELLOR:—This case has been very well argued, and if I could persuade myself that this was the case of a mortgagor and \*mortgagee, and that this was a [\*43] claim for an account of past rents on the part of the mortgagee, I should certainly follow the authorities which have been cited. Nothing is better established than that a mortgagee cannot have an account of by-gone rents; that principle is so settled that it cannot be impeached; but I decide this case on the ground that it is not a case of that nature. This case depends on the settlement of 1815, the object of which was to provide a sum of 500*l.* for the issue of the marriage, and subject to this charge it was agreed to leave the property in the settlor; it was then

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provided that an annuity equal to the interest on the charge should be paid to the parents, and the period for raising the principal was postponed for six years; the instrument is inaccurately framed: part was to be raised annually by 50% per annum, and invested in stock. Gooldsbury continued in possession, and in 1822 the period commenced from which the principal was to be raised by annual payments of 50%; previous to that, the agreement was entered into between Gooldsbury and Kearnan, and by the decree of the late Lord Chancellor, Kearnan was fixed with the liability to refund the rents received by him since 1822; the only ground upon which that decree could have been made is, that a trust was created, and that the court is bound to see that trust duly executed. It is probable that Kearnan was a mortgagee, and as such *pro tanto* a purchaser for valuable consideration; but then it was with full notice of the trust created by the settlement of 1815, which was recited in the deed of conveyance to

him, and he has rendered himself liable to this suit by [\*44] acquiring the property, the subject \*of that settlement.

As between Gooldsbury and the plaintiffs, would not the former have been bound to have seen the trusts executed? and supposing he had not performed that obligation, would it not have been a matter of course to oblige him to account? This is not the case of a continuing mortgage, but the dedication of the estate for a limited period for a particular specified purpose; therefore those in possession were bound to see the rents and profits properly applied. If Gooldsbury would have been liable (as undoubtedly he would), Kearnan, who stood in the same situation, was equally liable, particularly as he had full notice. The cases which have been cited decide a point which I do not controvert when I affirm the decree. Another objection is, that the prayer of the bill is not properly adapted to the relief which has been granted by the decree, on the ground that the first part of the prayer is inconsistent with the latter. But I uphold the decree on the first part, on the principle which I have stated. The bill is framed to impeach a lease of 1830, and if not successful in that view of the case, the prayer is then in the alternative, for an account of the past rents, and to let in the plaintiffs as first in-

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cumbrancers. I agree in what has been said, that the court in directing the execution of the trusts, should not wantonly interfere with the rights of a third party, and if I could see that this sum might be raised by the sale of the estate, or by means of a receiver, I would not make a decree for immediate payment. But this is a determinable interest; forty-four years have already expired, and one old life alone is in existence, \*which may drop while the proceedings are going on for [\*45] the sale of the estate. I think, therefore, the court ought to direct an immediate payment. If Kearnan shall pay the 500*l.* he will have the benefit of the entire security for the payment of his debt. With regard to the objection which has been made to the decree, on the ground that Kearnan was ordered to account with the plaintiffs, it is but a minor point, and I shall not alter the decree in that respect; the plaintiffs filed their bill, the decree declared them entitled to relief, and the court will take care that the money shall not be paid into their own hands, but to the credit of the cause; the decree requires no correction on that point. Another point is, that the bill sought to set aside the lease of 1830, both on the ground of undervalue, and because it contained a covenant permitting the tenant to commit waste. The Attorney-General has truly stated that the decree, though it dismisses the bill on that point, yet grants an injunction to prevent the waste; and he argues that this is inconsistent, but I do not see any inconsistency in it. The lease, as between the parties to it, is not impeached; it is a good lease as against the lessor, and yet before the payment of the 500*l.* it may happen that waste may be committed; now, although the lease may be sustained generally as a good lease, yet it is within the province of this court, while the 500*l.* remains unpaid, to prevent any waste which tends to injure or damage the security. It has also been said that the injunction is \*general, whereas [\*46] it ought to be limited until the payment of the money by Kearnan, and that then it ought to cease. There is no necessity for declaring when it is to cease; in a case of this nature the court will grant a general injunction, and when the time arrives for dissolving it, the party may apply and have it dissolved as a

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matter of course. The 500*l*. is to be invested, and add to the decree a declaration that the interest is to be paid to Kearnan during the joint lives of Turkington and wife. Kearnan must apply to discharge the receiver, and dissolve the injunction at the same time. No costs of the rehearing.

Reg. Lib.—“Vary said decree of 4th July last, by adding thereto a declaration that the defendant Owen Kearnan is entitled to be reimbursed out of the life interest of the defendant Richardson Turkington, the father in the pleadings named, so far as the same will extend for that purpose, the sum or sums he shall pay to or for the plaintiffs under the said decree. And that accordingly the said Owen Kearnan is to be paid from time to time during the lifetime of the said Richardson Turkington (or till the said O. Kearnan shall be so fully reimbursed), the dividends or interest which shall accrue upon the sum of five hundred pounds, late currency, in the said decree mentioned, with liberty to all parties interested to apply to the court on his death, as they may be advised. The parties to abide their own costs on this rehearing.”

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[\*47]     \*BOWEN *v.* KIRWAN.—KIRWAN *v.* BOWEN.

1835: 21st January.

Deeds of assignment set aside as having been obtained at undervalue from the assignors, who were far advanced in life and in needy circumstances, by a person whose situation enabled him to throw impediments in the way of the proceedings taken by them for the recovery of their demands, and who held out threats to that effect.

Although a mere false statement of the consideration does not in itself necessarily vitiate a deed, yet there may be cases where a false statement of itself may destroy the whole transaction.

By articles of the 13th of July, 1745, entered into on the marriage of Christopher Kirwan, certain fee simple lands in the county of Roscommon were settled upon the said Christopher for

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life, remainder to his first and other sons in tail, with an ultimate remainder to himself in fee; subject however to a charge of 1,200*l.* for the younger children of the marriage, in such shares as he should appoint; and with a power to him to charge the said lands with a further sum not exceeding 800*l.*, for such purposes as he should think fit. There were issue of the marriage two sons, John Richard, and Christopher, and two daughters, Margaret (afterwards married to Colonel Bowen), and Elizabeth (afterwards married to Charles Hamilton) and these two daughters, under a deed of appointment of the 20th of July, 1763, executed in pursuance of the said articles, became entitled to the two sums of 1,200*l.* and 800*l.* in equal shares. By a deed of the first of May, 1776, John Richard (who was then of age and the first tenant in tail), agreed to join his father in suffering a recovery of the said lands to such uses as he and his father should jointly appoint, and until such appointment should be made, to the same uses as they were respectively entitled to previous to the execution of the said deed; \*and in [\*48] Trinity Term, 1776, a recovery was accordingly suffered of the said lands. In 1776 John Richard, the eldest son, died (in the lifetime of his father) intestate and without issue, and without having made any appointment of the uses. Christopher Kirwan the younger, upon the death of his elder brother, became tenant in tail under the deed of 1745; and while so entitled, he executed two bonds with warrants of attorney in the penal sum of 3,000*l.* each, for the payment of two sums of 1,500*l.* to each of his sisters with the view to increase their fortunes; and in the subsequent term his sister Margaret caused a judgment to be entered on the bond passed to her. In the year 1781 Christopher Kirwan the younger joined his father in conveying the lands for the purpose of making a tenant to the precipe, in order to suffer a recovery, which it was declared should inure to such uses as they should jointly appoint, and in default of appointment to Christopher Kirwan the elder for life, remainder to Christopher the younger, and the heirs of his body, and for want of such issue, to such uses as the survivor should appoint; and in default of appointment to the right heirs of the survivor.

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And in Trinity Term, 1781 a recovery was accordingly suffered. Christopher Kirwan the younger also died in the lifetime of his father, without issue, and without having executed any deed of appointment; and in the year 1799 Christopher the elder died, having by his will devised his said estates to his daughter Elizabeth Hamilton for life, remainder to Christopher Hamilton, her eldest son, and his first and other sons in tail male; and [\*49] after various \*other limitations to the defendant P. Kirwan for life and his first and other sons in tail male, with remainders over. In 1824 Elizabeth Hamilton died, leaving Christopher Hamilton her eldest son, who then became entitled to a life interest in the said lands, and who, in 1827, was declared a lunatic, and the defendant P. Kirwan was appointed committee of his estate, and subsequently receiver over the property.

In 1802 Essex Bowen and Margaret his wife filed their bill to raise the amount due to them for principal and interest on foot of the two sums of 1,200*l.* and 800*l.*, and also on foot of the said judgment for 3,000*l.* The bill was amended several times, and on the 19th of July, 1830, the usual decree to account was pronounced. On the 17th of May, 1831, the Master made his report, and found that there was due to the said Bowen and wife a sum of 2,660*l.* 1*s.* 1 1-2*d.* for principal and interest on foot of their moiety of the two sums of 1,200*l.* and 800*l.*, and a sum of 2,771*l.* 7*s.* 1*d.* (equal to 3,000*l.* late currency) for principal and interest on foot of the judgment for 3,000*l.* Several exceptions were taken to this report by the defendant P. Kirwan, as committee of the lunatic's estate, which were all overruled; and on the 17th of June, 1831, the final decree was pronounced, by which the Master's report was confirmed, and the lands were decreed to be sold for the payment of the said sums.

Previous to the said final decree, a deed of assignment of the 24th of May, 1831, was executed between the said [\*50] \*Bowen and wife of the one part, and J. Kirwan of the other part, by which, after reciting the Bowens' title to

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the two charges of 1,200*l.* and 800*l.*, and that the sum ascertained by the Master's report to be due on foot thereof amounted to 2,660*l.* 1*s.* 1 1-2*d.*; the said Bowen and wife in consideration of that sum (purported to be paid to them by the said J. Kirwan), assigned to him all their right and title to the said charges of 1,200*l.* and 800*l.*, and all the interest that had accrued due thereon, and a regular receipt was indorsed on the deed for the full sum of 2,550*l.* 1*s.* 1 1-2*d.*

By deed of assignment of the 3d of August, 1831, and made between the same parties, after reciting that there was due to the Bowens on foot of their judgment of Trinity Term, 1779, the sum of 3,000*l.* late currency for principal and interest; the said Bowen and wife, in consideration of that sum (purported to be paid to them by the said J. Kirwan), assigned to him the said judgment with all the interest due thereon. This deed was duly executed by all the parties, but there was no receipt indorsed on it.

By a further deed of assignment of the same date and made between the same parties, after reciting the title of the Bowens to the charges of 1,200*l.* and 800*l.*, the judgment of Trinity Term, 1779, and the sum due on foot thereof (amounting to 3,000*l.* late currency), the final decree of the 17th June, 1831, and likewise the deed of the 24th May, 1831, "*and that the said Bowen and wife \*were anxious to get rid of law, being for many* [\*51] *years involved in endeavoring to recover said several sums so reported and decreed to them,*" and that they had contracted with the said J. Kirwan for the sale to him of the said judgment, and the said decree of the 17th of June, 1831, for the sum of 1,500*l.*; the said Bowen and wife in consideration of that sum (purported to be paid to them by the said J. Kirwan), assigned to him the said judgment and all the interest due thereon, and the said decree of the 17th June, 1831. No notice was taken in this deed of the assignment of the same day, but a receipt for 1,500*l.* was indorsed on it. It was proved that these assignments were all taken in the name of J. Kirwan in trust for his



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brother the said P. Kirwan, but no declaration of the trust appeared on the face of the instruments; Colonel Bowen died in the year after these transactions, intestate, and Thomas Bowen obtained administration to him; Mrs. Bowen died a few months before her husband.

The bill was filed by Thomas Bowen on the 12th of June, 1833, against the said P. and J. Kirwan for the purpose of setting aside these several deeds of assignment, as having been procured by misrepresentation and fraud, and without any adequate consideration. A cross bill was filed by P. Kirwan, praying that he might be declared entitled to the benefit of the decree of the 17th of June, 1831, and that the said Thomas Bowen might be directed to prosecute the same for his benefit, upon the [\*52] terms of \*being indemnified against any expenses he might be put to in so doing: and the cause came on to be heard upon these two bills. It was proved on the part of the plaintiff Bowen that the consideration given by P. Kirwan for the deed of the 24th of May, 1832, was a sum of 1,200*l.* of which 200*l.* only was paid in cash, and the remainder was secured by his promissory notes payable at different intervals; and that Bowen and wife were compelled to indorse on the notes that fell due in April, 1832, and October, 1833, a receipt for the sum of 72*l.* 10*s.* which was retained to defray the solicitor's costs for preparing the said deeds of assignment; and that P. Kirwan, as a consideration for the other two deeds of assignment of the 3d of August, 1831, executed two bonds conditioned for the payment of 700*l.* each, one to Colonel Bowen, and the other to Mrs. Bowen; both made payable at the expiration of ten years, with interest at five per cent.

Witnesses were examined on the part of the plaintiff in the original cause, who deposed that, at the time of these transactions, the Bowens were nearly eighty years of age, that they were then suffering under great privations and pecuniary embarrassments, and that, in order to induce them to part with their interests, representations were made to them by P. Kirwan that he had

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power to delay the legal proceedings, and could prevent the sale of the estate for the payment of their demands. As further evidence of which, the following document in the handwriting of P. Kirwan, and found among the papers \*of [\*53] Colonel Bowen after his death, was relied on: "In the recovery of 1781 it was agreed on that Christopher Kirwan the elder, and Christopher Kirwan the younger, should be joint parties to any charges made by them on the property: Christopher Kirwan the younger passed two bonds for 1,500*l.* each to his two sisters, chargeable on the estate, which estate he never possessed, having died before his father Christopher, who never joined him in the signing of the bonds notwithstanding their being bound by the recovery of 1781. The sisters, after the death of their father Christopher the elder, possessed estates each. Now the Chancellor in a hurry decreed the said judgment to be a good charge, giving the defendant an opportunity of applying for a rehearing of the judgment of 1,500*l.* with interest. Now it is for Colonel Bowen to consider that a rehearing will be; and should he succeed, it will take years before the sale can be effected, and a considerable time to make out title." On the other hand, the solicitor of the defendant, P. Kirwan, deposed, that the first overtures for a sale were made by Mr. Mills, who at that time acted as solicitor for the Bowens, that Mills came to him proposing a sale of all the interests, alleging that he was largely in advance to the Bowens, that the Bowens wished to reside in England, and that as P. Kirwan had a remainder in the estate, it would be better that he should become the purchaser. Several letters were then read to show the anxiety of the Bowens to dispose of their interests in the several charges, and also the friendly feelings \*entertained by [\*54] them towards the defendant P. Kirwan, and among others the following:

*" February 24<sup>th</sup>, 23 Dawson street.*

"MY DEAR COUSIN: I have been expecting to hear from you this long time, and have written three letters since September and have had no answer, which surprises me very much. I

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wrote twice to Mr. Jennings within this fortnight, but have not seen or heard from him. Colonel Bowen had seen Mr. Mills some time ago, who said all the law business was now finished : I understand it now remains with you ; I have no doubt but you will have it settled ; and, indeed, we are very much distressed.

“ I am, dear cousin, yours, very truly and affectionately,  
“ L. BOWEN.”

Evidence was also read to show that Colonel Bowen desired to have an indemnity against the costs incurred by him to his solicitor, Mr. Mills, and which letter of indemnity P. Kirwan gave previous to the execution of the assignments ; and further, that Mrs. Bowen having made a will of her separate estate, appointed J. A. Weldon one of her executors (the solicitor of the plaintiff Thomas Bowen), who, after the death of the Bowens, caused judgment to be entered on the bonds, and subsequently received interest on foot thereof ; and that one of the [\*55] \*promissory notes not having fallen due on the 6th of October, 1832, and P. Kirwan having declined to pay the same, he sued out a *capias* against him, in consequence of which P. Kirwan paid the amount due and the costs of the *capias* ; but Weldon deposed, that he did so without any communication with Thomas Bowen, and merely because he did not wish to leave these securities outstanding.

Mr. *Richards*, Mr. *O'Loghlen*, Mr. *Keatinge*, and Mr. *Blake*, for the plaintiff.

It is proved by the evidence in the cause that the deed of the 24th of May, 1831, does not state the consideration truly. There was due on foot of the charges assigned by that deed, a sum of 2,660*l.* 1*s.* 1 1-2*d.*, of which 1,000*l.* bore interest at 6*l.* per cent. ; in the deed of assignment the consideration is stated to be the full sum of 2,660*l.* 1*s.* 1 1-2*d.* ; in point of fact it was only 1,200*l.*, and even of that sum 200*l.* is all that was actually paid, the rest having been secured by the promissory notes of P. Kirwan, payable at long intervals ; and the Bowens were induced

to take the personal securities of P. Kirwan for the payment of this well-secured charge. A false statement of this sort in a deed will clearly vitiate it. *Watt v. Grove*; (a) *Drought v. Eustace*; (b) *Blashford v. Christian*. (c.) Next as to the assignment of the judgment, there were two deeds of the \*same day both professing to assign this charge, and [\*56] neither of them contains any allusion to the other: in one of them the consideration is stated to be 3,000*l.*, the full amount due on foot of the judgment; and in the other only 1,500*l.* This judgment was a valid charge affecting the estate which was established by the final decree of 1831; and the Bowens, whose necessities required immediate payment and who were far advanced in years, got for this judgment bonds for 1,400*l.* payable in ten years, with interest at five per cent.; whereas the original security bore interest at six per cent.; and although the parties may have treated these instruments differently, yet no interest is legally payable upon them for ten years; the bonds were a mere personal security, for it does not appear that P. Kirwan had any estate on which they could attach.

Another instance of the manner in which the Bowens were treated, was the circumstance of their being compelled to pay the costs of the various deeds of assignments, contrary to the usual practice which requires that they should be borne by the purchaser. It cannot be said in this case that there was any acquiescence on the part of the Bowens; at most it was only an acquiescence under the influence of the same poverty and distress which originally induced them to execute the deeds. It is true that Mr. Weldon sued P. Kirwan on one of his notes, and received interest and entered judgment on the bonds; but there is no evidence to show that, at the time, he was aware of the nature of the transactions between the Bowens \* and [\*57] Kirwan. In *Murray v. Palmer*, (d) a conveyance made by a woman in ignorance of her rights was set aside, although she had acquiesced and received interest on the purchase money

(a) 2 Sch. &amp; L. 501.

(b) 1 Molloy, 334.

(c) 1 Knapp's Privy Council Cases, 73.

(d) 2 Sch. &amp; L. 474.

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for twelve years. The court will also recollect that P. Kirwan, being the receiver and committee, could exercise complete dominion over the estate.

The *Attorney-General*, Mr. Warren, Mr. Litton, and Mr. Jennings, for the defendant.

The consideration for the deed of the 24th of May, 1831, was a sum of 1,200*l.*; we admit that 200*l.* only of this sum was actually paid; but P. Kirwan passed his promissory notes for the remainder, and such of them as became due in the lifetime of the Bowens were all paid to them, and it never occurred to them to raise this question. P. Kirwan passed two bonds for the payment of 700*l.*, each bearing interest at 5*l.* per cent., whereas the judgment did not bear interest beyond the penalty; this was the consideration for one of the deeds of assignment of August, 1831; the consideration for the other was an indemnity against the costs incurred by Colonel Bowen to his solicitor. The Bowens had instituted a suit for the recovery of their demands, which was attended with considerable delay and expense, and which caused them to be largely indebted to their solicitor Mr. Mills, and it appears that Colonel Bowen required an indemnity against these costs, which P. Kirwan gave him; [\*58] this was the \*consideration for the second deed of assignment of August, 1831. It is the practice in this country to state the amount due on foot of the judgment as the consideration of the assignment. We do not contend that the full value was given for those assignments; but the question is, whether P. Kirwan deceived the Bowens for the purpose of procuring them? The Bowens were not without the assistance of a professional adviser: Mr. Mills, a most respectable solicitor, acted for them. Now the proposition for a sale came in the first instance from the Bowens. Does this support the charge that P. Kirwan had laid a plan to deceive them? If he had intended to defraud them would he have waited until the Master's report had confirmed these charges, and ascertained the amount due? or would he not rather have treated for them before that report

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was made, while the litigation was pending which lasted from the year 1802 to 1831. The statement of the consideration in the deed of August, 1831, is not such as would deceive any person, because no one would give the entire amount in cash for a charge, a part of which only bore interest. It appears by the depositions in the cause, that the Bowens intended to pay P. Kirwan a compliment, they had no issue of their own, he was one of their nearest relatives, and had a remainder in the estate, and they were on the best terms with him. We have then two persons far advanced in life, and so utterly careless about every one else that they both died intestate as to these charges. It is not suggested that Mr. Mills, the solicitor of the Bowens, withheld from them any fact that could tend to apprise them of their rights. Again, we \*have the Bowens ac- [\*59] quiescing in these transactions, and Mr. Weldon receiving interest on the bonds. We do not rely upon this for the purpose of showing that the parties have disintitiled themselves to dispute these transactions from the length of acquiescence, but merely to show that at that time there was no idea of doing so.

Under all these circumstances, the consideration should be proved to be so inadequate as to raise not a mere suspicion, but a conviction that there was a fraud. The following authorities were also cited for the defendant: *Buller v. Buller*.(a) *Cory v. Cory*.(b)

THE LORD CHANCELLOR:—This case has been very well argued. I have heard all the counsel for the defendant, and I do not think it necessary to call on the plaintiff's counsel to reply. The material facts of the case, although apparently complicated, lie in a small compass. By a settlement of the estates in 1745, by which the charges at present in question were created, Christopher Kirwan the elder, became entitled to a certain interest in those estates, with a power to appoint a sum of 1,200*l.* amongst the younger children. He, besides other children, had two

(a) 1 B. P. C. 383.

(b) 1 Ves. Sen. 19.

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daughters, one of whom, Margaret (married to Colonel Bowen), became entitled to a moiety of the 1,200*l.* By the same settlement he had power to appoint a further sum of 800*l.* generally, \*making together the sum of 2,000*l.* This sum he gave to his two daughters in equal shares, and it then became vested in them, although it was not to be raised until the death of the settlor, which took place in 1779, and when he died, these sums were the first charge on the property, and became immediately raisable. The rents of the estates were not less than 1,000*l.* a year, and were therefore an ample fund for the payment of the interest on this charge. It does not appear what impediment existed at that time to the raising of these sums, but it is a reproach to the administration of justice in this country, that the first charge on an estate of such magnitude should not have been raised for such a length of time. The original bill for raising these charges was filed in 1802, and though no impediment is alleged, there was no decree until 1831, nor was a receiver appointed until 1830; whereas it would have been perfectly a matter of course to have obtained a receiver and got into perception of the rents as soon as the answer came in; the interest would then have been kept down until the charges were raised and the estate sold. In 1776, the eldest son of the settlor joined his father in suffering a recovery, by which the estate was limited to such uses as they should jointly appoint, and until appointment, the former limitations were to continue, and as no appointment was made, the recovery so far became inoperative. The eldest son having died without executing any appointment, the younger brother became tenant in tail under the settlement of 1745; he also suffered a recovery by which the estate was limited to such uses as he and his father should appoint, [\*61] and in \*default thereof to the father for life, remainder to the son in tail, remainder to the survivor in fee. P. Kirwan claimed, under a devise by the father, the ultimate remainder in fee. He was also committec of the estate of the lunatic tenant for life in possession, and was, therefore, at the same time, not only acting for the lunatic's estate, but had also his own remainder to protect. I cannot enter into the question

whether at that time he was entitled to that remainder, because he treats himself throughout as the person entitled in remainder. I must therefore consider him to have filled that character. P. Kirwan was also appointed receiver, which gave him a power over the estate, and being committee of the lunatic he could exercise his influence without bringing himself forward. Now as to the judgment for 3,000*l.*: when the second son came into possession, he provided a further portion of 1,500*l.* for each of his two sisters, secured by his bonds on which judgments were entered, which bound the remainder in tail. As against the tenant in tail, it has been asked what uses would have resulted had none been limited upon the second recovery in default of appointment, as it appears at one time to have been supposed? I take it to be clearly settled that the uses would have resulted to the father for life, remainder to the son in fee: he would have taken a fee simple expectant on the particular estate for life in the father, and the judgment for 3,000*l.* would bind the estate next after the charge of 1,000*l.*, created by the settlement of 1745. The recovery in all events let in the judgments as a confirmation of those incumbrances created by the tenant in tail, and they were therefore available immediately \*in like manner as the original charge. Mrs. Bowen was entitled to principal and interest, from the death of her father; that is, to a sum of 3,000*l.*, the whole amount of the penalty. Under these circumstances, it is admitted that the first overtures were made by the Bowens. Counsel thought it necessary to press severely on the character of one of the witnesses, but I do not think that her evidence was open to his observations, although they were fairly made at the bar in defence of his client. She speaks with great minuteness of the circumstances of the Bowens; she describes them as steeped in poverty and surrounded by embarrassments. An observation has been made, which I think incorrect, that as they died not in debt, therefore they could not have been in distress: that does not follow, for if they contrived to live on their small means, and to accommodate themselves to their circumstances, however miserable, they might have died without being in debt. An argument has been urged, but which



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does not decide the question, that they had a solicitor named Mills, who was living in March, 1831, and that the proposition for a purchase did not proceed from P. Kirwan but from Mills. I do not like to see a case supported entirely by the evidence of an attorney for one of the parties, examined on sixty-five interrogatories, and that after the death of the principal, whose solicitor he in point of fact was, for it appears that at the time of the sale no other attorney acted for the Bowens except Jennings, the solicitor for P. Kirwan, who now comes forward to repeat entire conversations; the evidence is not of much weight, and is such as the court must look at [\*68] \*with great suspicion at all times, and deal with with great caution. But it is said that there is evidence that there was a counsel and solicitor concerned in the transaction, inasmuch as it was proved that Bowen said he consulted Middleton, who consulted Mr. Ball. I must take it that Bowen had no professional assistant or adviser at all, or if he had advice it was only such as tended to mislead him. The evidence shows, and I must conclude, that Mills proposed a sale of all the interests. It is true, the rights arose under different instruments; but they had a right to an aggregate sum, and could have sold it, to use a Scotch expression, for a slump sum. Mills' grounds for selling are not satisfactory: first, he said, they owe me money for costs which I am anxious to get; secondly, the Bowens wish to live in England; thirdly, you are an interested party in the estate; but I see nothing to show that there was any other consideration than that appearing on the deeds. No doubt if the Bowens had chosen to make a present to Kirwan, they had a right to do so; and if Kirwan wished to rely on that as a part of the consideration, he should have so recited it on the face of the deed. Now if we look at the deed itself of the 24th of May, 1831, we shall find that it is nothing more than a common ordinary instrument; it is a mere assignment of their interest in the portions. It recites a contract for the sale of the portions for 2,660*l.* 19*s.* 11-2*d.* I must observe, that this assignment was taken in the name of J. Kirwan, not in the name of the real purchaser, and there does not appear to be any declaration of trust from him to P.

Kirwan: the circumstance of the real purchaser putting \*another person forward, and retiring from the face of [\*64] the deed is suspicious: a formal receipt is indorsed on the deed for the whole amount of the consideration, and the first question is, is that a contract standing by itself? I will try it by itself: a letter has been read which was written by Mrs. Bowen to P. Kirwan, dated the 24th of February, 1831, which shows that the Bowens were oppressed by the delay in law. [His Lordship here read the letter.] Notwithstanding the reason she had to complain of the delay of the law, she yet hopes that the long delay would soon be at an end; rather a sanguine expectation, after having been kept out of her rights for such a length of time. In the deed of the subsequent month and in the evidence, there is a statement, though not entitled to great weight, that they were unwilling to have further delay, and that P. Kirwan used language amounting almost to threats of further delay to influence the parties. In a subsequent part of the evidence, it is said he threatened to throw impediments in their way; and a letter which has been read proves that P. Kirwan, by denying the validity of their title to 8,000*l.*, was endeavoring to alarm the Bowens to induce them to part with their property. P. Kirwan was committee of the lunatic tenant for life, and I must treat him as remainder man in fee. He was also appointed receiver, and as such was in the actual possession: the account shows that there was but little arrear, and that the rents were regularly paid. The Bowens, who were entitled to the first charge on the estate, never received a single shilling except two sums of 30*l.* and 50*l.*, and a large sum was improperly withheld from them; \*it appears that 500*l.* a [\*65] year was the allowance for the lunatic tenant for life, which was regularly paid: it was a great abuse to permit this large allowance to be made to the lunatic, whilst the person entitled to the first charge, antecedent to his estate, was not paid any portion of it.

The consideration in one of the deeds of assignment is expressed to be for the whole sum due; and I am told that by a

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statute<sup>(a)</sup> in this country, the memorial of such a deed must state the sum due; but there is no law which requires you to state on the face of the assignment that which is false. It is also said that no man in his senses would give the whole sum in money for this charge of the portions; I can conceive that any man in his senses might have done so: it was the first charge bearing 6l. per cent. on an unincumbered estate. How could money be lent on better security?

I do not agree with all the doctrine laid down by Sir A. Hart, in *Drought v. Eustace*;<sup>(b)</sup> although I do not quarrel with his decision in that case. I am not prepared to hold that a mere misstatement of the consideration would in itself be sufficient to vitiate a contract.<sup>(c)</sup> \*I know that conveyancers are in the habit of stating the consideration in deeds differently from what it really is. To give a familiar instance: suppose a purchaser of an estate who has not the whole of the purchase money ready to pay down, and the parties agree that a portion of it shall remain in his hands, and be secured by a mortgage on the estate, the deed may state the entire sum to be paid, and a receipt may be signed and indorsed on the conveyance for the whole sum; and by a subsequent deed of the next day, reciting that so much of the purchase money remains unpaid, the estate may be mortgaged for the residue; yet such a misstatement will not vitiate the conveyance; but in such a case the consideration is in accordance with the actual agreement of the parties; it is not the case of one consideration bargained for and another given; so that a mere false statement of the consideration would not in itself necessarily vitiate a deed. But false statements must always have great weight; and there may be cases where a false statement of itself may destroy the whole

(a) 9 Geo. 2, c. 5, Ir.

(b) 1 Molloy, 328.

(c) See *Tanner v. Byne*, 1 Sim. 160; *Leahy v. Dancer*, 1 Molloy 319. But where a conveyance purports, in the body of it, to be for valuable consideration, it cannot be supported on the ground of natural love and affection; *Willan v. Willan*, 2 Dow. 274; *Bridgman v. Green*, 2 Ves. Sen. 627; *Clarkson v. Hanway*, 2 P. Wms. 204, and cases in note to the last edition.

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transaction. Here the consideration stated in the deed is 2,660*l.* 19*s.* 7 *d.*; the real consideration as proved was 1,200*l.* only, and 1,000*l.*, part of it, was secured by twelve promissory notes at various dates, the last two of which were not payable until the 26th October, 1833. Mrs. Bowen died in February, 1832, and Essex Bowen in the succeeding March. It is admitted that only 200*l.* was actually paid at the time. Now, the fact is, that P. Kirwan never paid even that 200*l.*, for I find, upon inspecting the accounts, that in his receiver's account he is allowed credit for that very sum as interest on the charge; \*so [\*67] that he pays the Bowens out of their own money, and takes an assignment of the charge to himself. The case depends on one transaction represented and another executed to the detriment of the sellers; they expected money and obtained securities, and that in a case where the charge was well secured and a large arrear of interest due on it: why was not the money paid down? The transaction as to the 200*l.* was a fraud. I ask is it possible to sustain such a contract? If I do not set aside these instruments, I do not know a case where the consideration is misstated, in which I could set aside the conveyance.

Although this was not the case of a party dealing for a reversion, yet I must consider it as similar in its circumstances; because although it was a charge immediately raisable, yet a sad and long experience of thirty years must have satisfied the Bowens, however clear their rights, that if opposed by P. Kirwan they could not enforce them. I decide this case then on all the circumstances, and not on any abstract rule.

I cannot look upon the receipt of small sums under the promissory notes as amounting to acquiescence. The acquiescence is not put on the length of time, for the interval is very short, as the Bowens died in the subsequent year, but as tending to rebut the imputations of fraud in the transaction; but the time was too short to afford a conclusion that the real nature of the transaction \*was understood. There is no evidence [\*68] that Weldon had notice of the nature of the transaction;

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his receipts do not bind the plaintiff, but as he did receive money on foot of the securities and brought an action on one of them and took those steps without inquiry, I shall not give costs as to that part of the inquiry.

But although I have treated the contract of May, as standing by itself, yet I am not prepared to consider this a case of two distinct transactions, but it must be taken as one continued dealing for all the rights of the Bowens. It appears by the evidence, that the proposition was for a sale of all the interests in all the sums derived under the settlement of 1745; and the reason given by P. Kirwan why he would not buy the judgment of 1779, namely, that it was not a valid charge, is not sustained on the ground of the objection put forward by him, that as there was no limitation in default of appointment in the second recovery deed, the second son did not take an estate in fee; and therefore the judgment did not bind the ultimate remainder.

It is in evidence that threats were held out. The letter found among Kirwan's papers in the handwriting of Kirwan, clearly proves that fact. He says in it, the Chancellor decided the case in a hurry—that a rehearing will be necessary—and a long time must elapse. The court must consider to whom this was addressed; to two aged persons of the advanced age of eighty years, and in considerable distress, desirous of converting their property into money; this was a document well calculated to excite their fears. On the 31st of May, P. Kirwan, as committee of the tenant for life, takes an exception to the Master's report: this shows the great power he could exercise as committee of the tenant for life, when he could disport himself with these questions, and as receiver withhold the rents; he was therefore in a situation to exercise great power.

The Bowens were obliged to pay the costs of the several deeds of assignment: now, we know that the expense of a conveyance is always borne by the purchaser, unless there is an agreement to the contrary; this, connected with other circumstances, is entitled to weight.

When P. Kirwan became master of one charge, he instantly attacks the other. This paper is sent in which he speaks of a rehearing: on one of the assignments of the 3rd of August, 1831, there is no indorsement of a receipt for the consideration; the other deed of assignment of the same date contains no allusion to the execution of the assignment of the same day, and there is in it a recital, which tells us plainly what influenced the Bowens. It is this, "whereas they were anxious to get rid of law, &c.," so that these poor people, after having been wantonly kept out of their rights, are compelled to make an assignment of their interests to the very person who was bound to pay them. The first deed of August, 1831, recites the contract of sale to be for the amount of the sum due, viz.: 3,000*l.* and the assignment is made in consideration of that sum; the deed of even \*date recites the contract of sale to be for 1,500*l.* the real [\*70] consideration as proved is 1,400*l.*, although I may observe that, on the 27th July, 1831, 1,500*l.* was the sum offered for the judgment, and that agrees with the second deed of August. Which of the three contracts is intended to be set up, the one for 3,000*l.* that for 1,500*l.*, or the one proved, viz., that for 1,400*l.*? The deed being an assignment of the rights under the decree, is, though not in words, an assignment of the costs as far as they could be assigned. It appears that Bowen applied to P. Kirwan to indemnify him against the costs, and P. Kirwan undertook to indemnify him against taxed costs, but did not state whether against costs as between solicitor and client. The Attorney-General was forced to contend that the 1,500*l.* was a nominal consideration, and that the real consideration was an indemnity against costs. Supposing such an argument admissible, can I allow the parties to say that the consideration was not 1,500*l.* but merely an indemnity against the costs? But the deed does not really assign the costs by assigning the rights under the decree, for the costs do not go into the pocket of the party, but to the solicitor in the cause. This assignment was a further assignment of the same day, and the indemnity was an after thought. I must consider the assignment for 1,500*l.* as intended to state the real transaction; the first may be treated as a nominal consider-

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ation, but I cannot so consider the second. By a letter of P. Kirwan to Bowen, he proposed to give 1,500*l.*; as far as the transactions appear on the face of the deeds, I must consider that the real consideration, and the one in the other deed

[\*71] \*a mere nominal consideration; and yet the real consideration is proved to be 1,400*l.* Notwithstanding all the cases, I would, if the case were a fair one, support the second assignment; but I cannot permit the purchaser to travel out of the deed.

If I wanted evidence of the absence of a professional adviser, I should find it in the framing of the bonds; the 1,400*l.*, instead of being paid, was secured by two bonds payable at the end of ten years; now, the bonds are so framed as not to make the interest payable until the end of the ten years. I am clearly of opinion that the interest under these instruments would not be payable until the principal became due; it is said the parties acted on a different construction of those bonds, and that the interest was paid yearly or half yearly; but that does not relieve the case; if I find parties taking instruments not reconcilable with each other, and giving securities that cannot be enforced according to the intention, the contracts cannot be supported. The sellers were eighty years of age, and therefore prompt payment must have been of vital importance to them; yet, although upon the first transaction they relinquished in the purchaser's favor all the interest due except 200*l.*, yet nearly the whole of the price was secured by instalments by promissory notes, and upon the second transaction the whole of the price was postponed in payment for ten years. It was a mere mockery; I shall, therefore, set aside the contracts.

There are some minor points in the case affecting

[\*72] \*both of the contracts. P. Kirwan, who, as receiver, could pay himself the interest on the charges, and who had in his hands a balance from time to time applicable to discharge the principal, puts into his own pocket the difference of interest between six per cent. on the charge, and five per cent.

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on the bonds. I cannot overlook the circumstance that the Bowens were far advanced in years. The giving them not money, but personal securities; and for the judgment, a security payable in ten years, was a mere delusion. The purchaser secured by his notes and bonds, sums which they could hardly live to receive, and took from them a much larger sum, long due and secured upon an unincumbered estate, with a receiver and a title established by a court of equity. I have no hesitation in setting aside these deeds; but as the personal representative of the Bowens has acted upon the securities without inquiry, though I do not consider that his proceedings bind him, yet I will not give any costs. I shall direct an account of all sums received by P. Kirwan as receiver, and of all sums paid by him on account of the charges, and on account of the sums received by him in respect of the charges. The cross bill must be dismissed.

“Reg. Lib.—Set aside the two contracts, of 24th May, 1831, and 3d August, 1831, respectively, and refer it to the Master to take an account of all sums paid by the defendants, or either of them, to Essex Bowen and Margaret his wife, or either of them, or to their respective personal representatives for, or on account, or in respect of the purchase of the charges and judgments in the said deeds respectively mentioned, with interest on same respectively \*from the respective days of [\*73] the payment thereof; and let the Master also take an account of all sums received or taken credit for on foot of said charges and judgments by the said defendants or either of them, or by any person or persons by their or either of their order, or for their or either of their use, together with interest on such last mentioned sums respectively from their respective days of payment, or the days upon which credit was taken for the same; and in taking said account let the sum which shall appear due for principal and interest from the defendants, or either of them, be from time to time set off against the sum which shall appear due to the said defendants or either of them, on the account aforesaid, and let the balance be thereupon struck by the Master,



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and let same be paid to the party entitled; and in case such balance shall appear to be in favor of the defendants, on plaintiff's paying to the defendants within three months after the Master's report shall have been confirmed, or in case the defendants shall be reported to have been fully satisfied, let the defendants deliver to the plaintiff the said deeds of the 24th May and 3d day of August to be cancelled; and thereupon let the plaintiff acknowledge satisfaction on the record of the judgment obtained against said Patrick Kirwan, and in the pleadings mentioned, and also the defendant James Kirwan, to re-assign to the plaintiff the several charges, judgments and matters comprized in and assigned to the said defendant by the deeds aforesaid; and if any balance shall appear to be due and owing from the said defendants or either of them upon the account aforesaid, let the said defendants also pay the same to the plaintiff

[\*74] Thomas Bowen, or his attorney thereto lawfully \*authorized, within three months after the confirmation of the Master's report ascertaining such balance. The parties to abide their own costs."

This decree was affirmed on rehearing before Lord Chancellor Plunket.

As to mere inadequacy of price, it is clearly settled that legal transactions cannot be set aside upon that ground alone; *Low v. Barchard*, 8 Ves. 137, and the cases collected in the note, and in the note to the case of *Floyer v. Sherard*, 1 Ambler, 18; *Murray v. Palmer*, 2 Sch. & Lef. 488; *Mac Ghee v. Morgan*, 2 Sch. & Lef. 395, n.; *Purcell v. McNamara*, 14 Ves. 91; "unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction;" *Coles v. Trecothick*, 9 Ves. 246; *Stilwell v. Wilkins*, Jac. 282; *Underhill v. Horwood*, 10 Ves. 209; *Lowther v. Lowther*, 13 Ves. 103. But if any advantage has been taken, inadequacy, though not so great as to shock the conscience, will go a vast way to constitute fraud; *Morse v. Royal*, 12 Ves. 373. And inadequacy of price, coupled with great distress and the absence of professional advice, is sufficient ground for setting aside a sale; *Wood v. Abrey*, 3 Mad. 417.

But mere inadequacy of price is sufficient ground to set aside dealings with expectant heirs for their expectancies. See the cases collected in the note to *Davis v. Duke of Marlborough*, 2 Swans. 139-143; *Blakeney v. Bago*, 3 Bl. 237. And it lies on the purchaser to show that an adequate consideration was paid; 2 Swans. *ibid*. But it would seem that the rule will not apply if the transaction be known to the father or

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person in *loco parentis*, and not opposed by him; *King v. Hamlet*, 2 Mylne & Keen, 456. In *Gowland v. De Faria*, 17 Ves. 20, on the same general principle, inadequacy of price was held sufficient to vitiate the sale of reversionary interests, and although the decision in that case has been questioned in several subsequent cases, see *Shelly v. Nash*, 3 Mad. 236; *Wood v. Abrey*, 3 Mad. \*422; *Headen v. Rosher*, M'Cl. & Young, 89; *Potts v. Curtis*, 1 Young, 543; *Scott v. Dunbar*, 1 Molloy, 458; yet recent decisions seem to have recognized the authority of that case; see *Hilliard v. Gambel*, Tambl. 375; *Hincksman v. Smith*, 3 Russ. 435; *Earl of Portmore v. Taylor*, 4 Sim. 182; and *Newton v. Hunt*, 5 Sim. 520; but an exception has been made in the case of sales of reversionary interests by auction; *Shelly v. Nash*, 3 Mad. 232; *Fox v. Wright*, 6 Mad. 111. And dealings between father and son, though looked upon with a reasonable degree of jealousy, will not be regarded in the light of reversionary bargains, but as family arrangements; *Tendril v. Smith*, 2 Atk. 85; *Tweddell v. Tweddell*, 1 Tur. & Russ. 13. And though a reversion dependent upon the contingency of tenant for life, dying without issue, is not the subject of estimate or calculation, yet if the purchaser in his dealing has himself put a value upon the contingency, the court will adopt his valuation with respect to it, and inquire into the adequacy of the price paid for the reversion without reference to the contingency. *Baker v. Bent*, 1 Russ. & Mylne, 224, S. C. Tambl. 368.

The following are the principal cases in which deeds obtained by *undue influence*, independent of any fiduciary relation, have been set aside; *Ormond v. Fitzroy*, 3 P. Wms. 129, and the cases collected in the note; *Bridgman v. Green*, 2 Ves. Sen. 627, S. C. Wilm. 58; *Norton v. Rely*, 2 Eden, 286; *Wright v. Proud*, 13 Ves. 136; *Purcell v. McNamara*, 14 Ves. 91; *Huquenin v. Baseley*, 14 Ves. 273; *Collins v. Hare*, 1 Dow. N. S. 139. But old age alone is not a sufficient ground to presume imposition; *Lewis v. Paed*, 1 Ves. Jun. 20.

The court will not permit dealings between parties where a confidential relation exists, except under the restrictions hereafter noticed; as, 1st. GUARDIAN and WARD; *Hylton v. Hylton*, 2 Ves. Sen. 547; *Hamilton v. Mohun*, 1 P. Wms. 118, and the cases in note; *Hatch v. Hatch*, 9 Ves. 292; *Cary v. Cary*, 1 Sch. & Lef. 173; *Aylward v. Kearney*, 2 Ball & Bea. 463; *Revett v. Harvey*, 1 Sim. & S. 502; and even after the relation has ceased if the influence thereby obtained continues. *Dawson v. Massey*, 1 Ball & Bea. \*232 and 236; but see *Oldin v. Samborn*, 2 Atk. 15. [\*76] 2ndly. ATTORNEY and CLIENT, *Walnesley v. Booth*, 2 Atk. 27; *Welles v. Middleton*, 1 Cox, 112, S. C. 4 Bro. P. C. 242, cited 12 Ves. 372; *Newman v. Payne*, 2 Ves. Jun. 199; *Ward v. Hartpole*, 3 Bli. 488; *Wood v. Downes*, 18 Ves. 120; *Falkner v. O'Brien*, 2 Ball & Bea. 214; *Goddard v. Carlisle*, 9 Price, 183; *Bellew v. Russell*, 1 Ball & Bea. 107; *Blakeney v. Bagot*, 3 Bli. 237, N. S. *Malony v. L'Estrange*, 1 Beatty, 106; unless "he can show to demonstration that no industry he was bound to exert would have got a better bargain for his client;" *Gibson v. Jeyes*, 6 Ves. 271; *Champion v. Rigby*, 1 Russ. & Mylne, 539. Or unless the connexion be *bona fide* dissolved; *Oldham v. Hand*, 2 Ves. Sen. 259; *Montesquieu v. Sandys*, 18 Ves. 313. Or the solicitor put himself completely at arm's length; *Cane v. L. Allen*, 2 Dow. 289. 3rdly. PRINCIPAL and AGENT. Generally an agent employed to sell cannot purchase for himself *at undervalue*; *Crowe v. Ballard*, 2 Cox, 253, S. C. 1 Ves. Jun. 215, S. C. 3 B. C. C. 117; *York Buildings Company v. Mackenzie*, 8 Bro. P. C.

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42; *Lord Hardwicke v. Vernon*, 4 Ves. Jun. 411; *Watt v. Grove*, 2 Sch. & Lef. 492; *Wren v. Kirton*, 8 Ves. 502; *Medlicott v. O'Donnell*, 1 Ball & Bea. 164. And if any doubt is raised he must show that he has made as good a bargain for his employer as against himself, as a provident steward acting most adversely would. *Harris v. Tremenhare*, 15 Ves. 42; *Cane v. Lord Allen*, 2 Dow. 289; *Selsey v. Rhoades*, 2 Sim. & S. 49. Or that the transaction has been confirmed by the vendor, *Grove v. Ballard*, 2 Cox, 253; *Woodhouse v. Meredith*, 1 Jac. & W. 204. If employed to purchase an estate he purchases for himself, he will be considered a trustee for his principal, *Less v. Nuttall*, 1 Russ. & Mylne, 53; affirmed in 2 Mylne & Keen, 819. But an agent may take a benefit which is of the pure gift of his employer; *Harris v. Tremenhare*, 15 Ves. 39; *Cray v. Mansfield*, 1 Ves. Sen. 319. 4thly. TRUSTEE AND CESTUI QUE TRUST. A trustee to sell cannot purchase the trust property for himself, *Whelpdale v. Cookson*, 1 Ves. Sen. 9; *Fox v. Mackreth*, 2 B. C. C. 400; *Attorney-General v. Lord Dudley*, Coop. 146; at least by so doing he will not be permitted to gain any advantage to himself, *Whitchote v. \*Lawrence*, 3 Ves. 740; and the sale is liable to be reopened by the *cestui que trust* coming in within a reasonable time, *Campbell v. Walker*, 5 Ves. 678, 8. C. 13 Ves. 601; *ex parte Lacey*, 6 Ves. 625, and cases in note; *Lister v. Lister*, 6 Ves. 631; *Randall v. Errington*, 10 Ves. 423. But a trustee may buy from the *cestui que trust*, if it appear that the latter intended the trustee should buy, and there is no advantage taken by him of information acquired in that character. *Coles v. Trecothick*, 9 Ves. 246; *Andrews v. Mowbray*, Wils. Ex. Rep. 71; *Clarke v. Swaile*, 2 Eden, 134; *Morse v. Royal*, 12 Ves. 355; *Louther v. Louther*, 13 Ves. 95; or provided he divests himself of the character of trustee, *Downes v. Grazebrook*, 3 Mer. 200. But the trustee of a party not *sui juris* cannot purchase except by application to the court; *Sanderson v. Walker*, 13 Ves. 601; *Mulvany v. Dillon*, 1 Ball & Bea. 418. Neither can the agent of a trustee (employed to sell) purchase for himself, *Whitcomb v. Minchin*, 5 Mad. 91; or an auctioneer employed to sell, *Oliver v. Court*, 8 Price, 127. And the same principles are applied with more force to the assignees of bankrupts, *ex parte Reynolds*, 5 Ves. 707; *ex parte Lacey*, 6 Ves. 625, and cases in the note; *ex parte James*, 8 Ves. 837; *ex parte Bage*, 4 Mad. 459; *ex parte Hodgson*, 1 Glyn & J. 14, and to the solicitor of the commission, *ex parte Bennet*, 10 Ves. 381; and to an arbitrator, *Blenderhassel v. Day*, 2 Ball & Bea. 116; and to an executor, Anon. 1 Salk. 155; *Hall v. Hallet*, 1 Cox, 134; *Watson v. Toone*, 6 Mad. 153. But a conveyance, under a power to sell, by an executor to a trustee for himself, or to a co-executor who has renounced, is *good at law*; *Mackintosh v. Barber*, 1 Bing. 50, 8. C. 7 Moore, 315.

But the court will not lend its aid after a long acquiescence, *Gregory v. Gregory*, Coop. 201; *Wilton v. Browne*, 1 Ball & Bea. 180; *Medlicott v. O'Donnell*, 1 Ball & Bea. 156; *Price v. Byrne*, cited 5 Ves. 681; *Parkes v. White*, 11 Ves. 226; *Morse v. Royal*, 12 Ves. 355. On the same general principle of undue influence, leases from mortgagor to mortgagee will be set aside, *Gubbins v. Creed*, 2 Sch. & Lef. 214; *Webb v. Rorka*, 2 Sch. & Lef. 661.

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Trant v. Bury.

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\*TRANT v. BURY.

[\*78]

1835: 22d January.

An account of rent decreed, under the circumstances, against the personal representatives of a lessee who had assigned his interest.

THE bill stated that Francis Annesley and Mary his wife being seised in fee of certain premises, in right of the said Mary, by indenture of the 18th of February, 1770, demised the same to Richard Aldworth for three lives or thirty-one years, at the rent of 44*l.* 15*s.* payable to said Francis and Mary and the heirs and assigns of the said Mary, on the 1st of May and 1st of November in each year.

That on the 13th of May, 1784, Mary Annesley made her will, and thereby, by virtue of a power given to her by her marriage settlement, and a certain deed of the 1st of July, 1769, devised the said premises to the plaintiff for life; that Mary Annesley died in 1794, and the bill charged that the plaintiff thereupon became entitled to an equitable estate for life in remainder in the said premises (the legal estate being outstanding, having been conveyed to a trustee, E. Scriven, by the deed of the 1st of July, 1769); that the plaintiff subsequently became seised in possession of the said premises; and being so seised that plaintiff had been in the receipt of the rent payable by the said Richard Aldworth, who died in the year 1824, having by his will appointed the defendants R. Bury and J. Flood his executors, who entered into possession of the demised premises and paid rent to the plaintiff, and \*continued [\*79] in possession until the expiration of the lease by the death of the surviving *cestui que vie*, on the 10th of May, 1827; that the premises were then delivered up to the plaintiff, at which time the sum of 111*l.* 15*s.* 4*d.* was due for rent.

The bill then prayed an account of the rent due on foot of the lease of 1770. and an account of the personal estate of the lessee,

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and that it might be applied in due course of administration, and the rent due to the plaintiff be paid thereout.

The defendants in their answer stated that Richard Aldworth, in the year 1778, assigned all his interest under said lease of 1770 to Sir B. Chinnery, and denied that they had entered into possession of the demised premises, or ever paid the rent to the plaintiff, or that any rent was due out of the assets of the testator, but stated that they believed the rents were, after the death of Richard Aldworth, duly paid to the plaintiff by R. Austen who claimed under the said Sir B. Chinnery (the assignee of Richard Aldworth), and that even if any rent were due, it could only be a proportional part from the 1st to the 10th of May; that in 1781 E. Scriven reconveyed the said lands to the said Annesley and wife, and as the legal estate was not outstanding, the proper remedy was by action at law; they also admitted assets, and stated, that, "they would set up every legal objection to legal proceedings for the recovery of said arrear of rent, which they might think founded on justice and good con-  
[\*80] science, \*inasmuch as anything like a gratuitous admission of the plaintiff's demand would not fail to be pressed against them in any action which they might bring against the representatives of Sir R. Chinnery."

Mr. *Lefroy*, Mr. *Jackson* and Mr. *Henn*, for the plaintiff.

The defendants state in their answer they will set up every legal bar. The 23 and 24 Geo. 3, c. 46, Ir., gives an action for a portion of the rent where the lessee dies before the gale day; at law, therefore, two distinct actions would be necessary; 1st, for the half year's rent and then for an apportionment from the last gale day.

Mr. *Warren* and Mr. *Furlong*, for the defendants.

If the bill were for an account of assets there might be some reason to sustain it, but the defendants having admitted assets,

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the proper remedy is an action at law. Sir A. Hart, in a case before him, dismissed a bill which sought for an account on foot of a promissory note, where it appeared that the account was not necessarily complicated. This is a demand for a specific sum; it ought to appear that there is no remedy at law. *Holder v. Chambury*,<sup>(a)</sup> The plaintiff might maintain an action either in her own name or that of the trustee, and it is not stated that the trustee refused to lend his assistance.

\*THE LORD CHANCELLOR:—The case before Sir An- [\*81]  
thony Hart was the case of a simple demand, here from the nature of the case it is evidently one of great complication of title, which circumstance of itself is sufficient to entitle a party to come into a court of equity, although it is not alleged that the assets have been wasted. The answer also states that the defendants would take advantage of every legal bar to defeat the plaintiff's demand, which is a sufficient ground for retaining the plaintiff's bill. Another objection to dismissing the bill is, that proceedings at law would cause unnecessary litigation, as in that case two actions would be necessary, one action for the arrears of rent, and another for the proportion from the last gale day. Besides, as the tenant has transferred his interest, it is difficult for him to know the state of the account between the lessor and the assignee; he is not in a situation to ascertain what is due; the plaintiff indeed may know what is due to him, but the tenant cannot know what is due to the plaintiff from the assignee. It is, I think, a case for an account.

As to the concurrent jurisdiction of courts of equity in matters of account, see also *Benson v. Baldwin*, 1 Atk. 598, and the cases collected in the note; *O'Connor v. Spaight*, 1 Sch. & Lef. 309; *O'Mahony v. Dixon*, 2 Sch. & Lef. 412; *Corporation of Carlisle v. Wilson*, 13 Ves. 275; *Hawkshaw v. Perkins*, 2 Swans. 546; *Corporation of Malden v. Coates*, 4 Mad. 447; *Cupit v. Jackson*, 13 Price, 721; but it would seem an account of quit rents will not be granted where there is a remedy at law; *Bouverie v. Prentice*, 1 Bro. C. C. 200; *North v. Earl of Strafford*, 3 P. Wms. 148; *Holder v. Chambury*, 3 P. Wms. 256.

(a) 3 P. Wms. 256.

[\*82] \*SALT v. DONEGALL.—COCKER v. DONEGALL.  
HOULDITCH v. DONEGALL.(a)

1835: 24th January.

D., tenant for life of estates in Ireland, by a deed of 1799, conveyed them for the payment of his debts to trustees, who issued debentures to the creditors. H. a debenture creditor, suing on behalf of himself and the other creditors, obtained a decree in the Court of Chancery in England, to carry into execution the trusts of the deed of 1799, and afterwards filed a bill in the Court of Chancery in Ireland to enforce that decree; that bill was dismissed, but the decree of dismissal was reversed by the House of Lords on appeal, who declared that the Court of Chancery in Ireland was bound to give effect to the English decree, and appoint a receiver over all the trust estates for the benefit of all the creditors. Before the bill was filed in Ireland by H., other debenture creditors had taken proceedings in this country, and subsequently, through the medium of receivers, realized a fund out of portions of the trust estates, which was lodged in court to the credit of their causes. Held, that H., not having made those creditors parties to the bill filed by him in Ireland, was not entitled to any part of the fund realized by them prior to the decree dismissing his bill; but as to the fund which accrued subsequently, he was entitled to come in *pari passu* with the other creditors, as, had the decree in his cause been rightly pronounced by the court below, he would have obtained a receiver at that time.

THE Marquis of Donegall being tenant for life of certain estates in Ireland, by a deed of the 20th of April, 1799, conveyed all his said estates to trustees for a term of ninety-nine years, upon trust out of the rents and profits, to pay him (Lord Donegall) 10,000*l.* per annum, and to apply the residue to the payment of his debts. Pursuant to a power contained in said trust deed the trustees issued assignable debentures; among the debentures so issued were two, No. 24 and No. 26, which

[\*83] subsequently \*became vested in Strange, Dashwood & Co., and formed the subject matter of the suit in the first cause.

On the 21st of June, 1802, the personal representatives of Henry Jones deceased (a debenture creditor), filed their original bill in the Court of Chancery in England, on behalf of themselves and all other the creditors of Lord Donegall, whose debts were prior to said trust deed, against Lord Donegall, the trustees

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and others as defendants, for the purpose of carrying into execution the trusts of the said deed of the 20th of April, 1799; and on the 27th of July, 1803, a decree to account was pronounced in that cause; but Lord Donegall having entered into a compromise with the plaintiffs, no further steps were taken in that suit to enforce the demands of the creditors, until the proceedings by Houlditch hereafter mentioned.

In the year 1825, Salt (the receiver of the assignees of the firm of Strange, Dashwood & Co.) and others, the plaintiffs in the first cause, filed a bill in this court to take an account of the sums due to them on foot of the said debentures, No. 24 and No. 26, and to have a receiver appointed over Lord Donegall's estates; and in January, 1832, a decree to account was pronounced, and a reference made to the Master, who reported a sum of 6,558*l.* 4*s.* 10*d.* as due to the plaintiffs in the first cause on foot of the debenture No. 26. Lord Donegall having appealed from this decree, it was affirmed by the House of Lords in August, 1834; meantime, by an order of the 16th of July, 1832, \*a receiver was appointed in the first cause over 5,204*l.* [\*84] 19*s.* 10*d.* per annum of the trust estates.

In April, 1821, J. Cocker, the plaintiff in the second cause, as administrator of J. R. Cocker (another debenture creditor), filed a bill in this court against Lord Donegall for an account of the sums due on the foot of the debentures vested in him, and an order for a receiver having been obtained, Lord Donegall proposed a compromise, and accordingly, in order to secure Cocker's demand, executed to him (by the aid of his son the first tenant in tail), a mortgage in fee of a portion of the said trust estates comprised in a certain deed of the 28th of October, 1822; Lord Donegall having failed to pay the sum secured by the said mortgage, Cocker filed another bill to have the trusts of that deed carried into effect, and in default of payment for a sale of the lands comprised therein. In May, 1832, he obtained a receiver upon consent over a portion of the trust estates, but no decree was pronounced in this cause.



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On the 24th of January, 1821, Houlditch and others, the plaintiffs in the third cause, who were also debenture creditors, filed their bill in the Court of Chancery in England, on behalf of themselves and the other creditors, praying that the decree of the 28th of July, 1803, obtained in the before-mentioned suit of *Jones v. Donegall*, might be carried into execution; and in June, 1827, a final decree was pronounced, establishing the right of the creditors to be paid out of the rents and profits of the estates comprised in the trust deed of 1799.

[\*85] \*In December, 1828, Houlditch filed a bill in the Court of Chancery in Ireland, on behalf of himself and the other creditors, in order to obtain the benefit of the several suits and proceedings in the Court of Chancery in England, and to have the same carried into execution by this court, and for the appointment of a receiver over the lands comprised in the said trust deed of 1799. That cause having come on to be heard, the bill was dismissed on the 23d of January, 1832; but on the 29th of July, 1834, the House of Lords, on appeal, reversed that decree, and declared that the appellants and the other creditors of Lord Donegall (entitled under the decree of 1827) ought to have the assistance of the Court of Chancery in Ireland for carrying into effect the order made by the Court of Chancery in England, whereby a receiver was ordered to be appointed over the estates comprised in the trust deed of the 20th April, 1799, and therefore ordered that it be referred to one of the Masters of the Court of Chancery in Ireland, to appoint a proper person to be receiver of the rents and profits of the estates comprised in the said trust deed, and that the further consideration of the said cause, and also the consideration of all further directions, and of the costs of the proceedings in that suit and under the said judgment, should be reserved to the said Court of Chancery in Ireland.

Pursuant to the said order of the House of Lords, a receiver was appointed on the 4th of November, 1834, over the entire of the estates comprised in the said trust deed of 1799.

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\*By an order of the Master of the Rolls, bearing date [\*86] the 1st of December, 1834, and entitled in the said three causes, it was ordered that the receiver in the first cause should be extended to the second cause, and that the receiver in the second cause should be removed as a separate receiver, and should pass his account and lodge the balance in his hands to the credit of the first and second causes; and that the receiver in the first cause should lodge to the credit of the first and second causes the sum of 5,290*l.* 18*s.* 9*d.*, being the balance in his hands, and that any payments out of the funds in the first and second causes should be stayed until further order; and that the plaintiffs in the third cause should be at liberty to file a supplemental bill, as desired in their notice, for the purpose of making the plaintiffs in the first and second causes parties to the third cause.

An application was now made on behalf of the plaintiffs in the first cause, that the Accountant-General should draw in their favor for the sum of 5,290*l.* 18*s.* 9*d.*, being the balance paid into bank to the credit of first and second causes by the receiver in the first cause; at the same time an application was made on behalf of the plaintiffs in the third cause, that all further proceedings in the first and second causes should be stayed, and that the plaintiffs in the first cause should come in under the judgment of the House of Lords in said third cause, and prove their demands, and be paid *pari passu* with the other creditors of Lord Donegall under the trust deed of the 20th of April, 1799, and that the \*receivers in the first and second [\*87] causes should be discharged and pass their accounts, and pay in the balance in their hands to the credit of the third cause, and that the sums in bank to the credit of the first and second causes might be transferred to the credit of the third cause, and the receiver in the third cause might act over the entire of the trust estates; and if the court should be of opinion that the plaintiff in the second cause might still resort to and abide by his debentures, notwithstanding the mortgage taken by him in lieu thereof, that in such case all further proceedings might be stayed in the second cause, and that he might come in under plaintiff's

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decree and prove his demand, and be paid equally with the other creditors, or that he might be restrained from receiving any of the rents of the trust estates for the satisfaction of his mortgage until all the other creditors should be paid their demands, without the plaintiffs in the third cause being obliged to file a supplemental bill against the plaintiffs in the said first and second causes.

Mr. *O'Loghlen*, Mr. *Ball*, and Mr. *Henn*, for the plaintiffs in the first cause.

The sum of 5,290*l.* 18*s.* 9*d.* is a fund which has been realized by our receiver, and the question is, is Houlditch entitled to any portion of that which we have made available by our exertions? It is clear that the rents, the subject matter of this motion, would, but for the active diligence of Salt, have been wholly lost to the entire body of the creditors; Houlditch could not have [\*88] got them, and they \*would have gone into Lord Donegall's pocket, who would have been entitled to retain them.

The receiver in the first cause, according to the practice in this country, was confined to so much only of the trust estate as was competent to pay off Salt's demand; it would be unjust therefore, when the order confined him expressly to a portion of the estate, that another creditor should intervene and intercept the fund realized by him. This must be considered as an application for by-gone rents; on that principle another creditor will not be permitted to interpose, and claim the fund paid into the court by the receiver in the first cause. *Gresley v. Adderly*,<sup>(a)</sup> *Thomas v. Brigstocke*.<sup>(b)</sup> In the former case Lord Eldon says that the order appointing a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and only so far as they choose to avail themselves of it; these are cases certainly of mortgages, but the principle is applicable to the present case; in the case of *Brooks v. Greathead*,<sup>(c)</sup> the court

(a) 1 Swans. 573.

(b) 4 Russ. 64.

(c) 1 Jac. & W. 176.

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refused to interfere with a fund realized by a puisne incumbrancer at the instance even of a prior creditor; and it makes no difference that the rents have not actually reached the pocket of the mortgagor. Salt was no party to Houlditch's suit, he was not a reported creditor in the English cause, for questions were raised as to his rights, and in order to establish his claims, he was compelled to file a bill here on his own behalf and not on behalf of himself and the \*other creditors, and cannot be [\*89] bound by any proceedings in Houlditch's suit.

*The Attorney-General and Mr. Bell for Houlditch.*

The decree of 1827 provided for the rights of all parties, and did not give a preference or priority to any one portion of the creditors over another; Salt and Cocker therefore cannot be allowed to engross by the receivers in their causes a part of the rents of the trust estates to the exclusion of those creditors who stand in equal rights with them. In *Hamilton v. Houghton*, (a) a decree was held to be erroneous in not giving to all the creditors, entitled under a trust deed for the payment of debts, the same benefit which was given to an individual creditor. We deny that this fund has been brought in by the superior diligence of any other creditor; for Houlditch filed his bill in this court in 1828, to carry into effect the decree of the English Court of Chancery; that bill was dismissed by Lord Plunket in 1832, on the ground of want of jurisdiction and not on the merits; pending Houlditch's appeal from that decision, and while his remedy was suspended by the dismissal of his bill, the other causes were still in progress, and this fund was brought into court during a period when Houlditch could not have interfered. The advantage gained by Salt was owing to the circumstance of the court having dismissed Houlditch's bill in 1832, and thereby having withheld from him the relief to which he was entitled, and which if it had granted, \*Salt would never have obtained a receiver. This is not the case of creditors having [\*90]

(a) 2 Bl. 170.

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different demands, but the question is between creditors all standing on the same footing and claiming under the same instrument. These rents have not been paid to the creditors, and there is a great difference between filing a bill to compel a creditor to refund what he has actually received, and a motion to prevent his getting into his hands a fund still in the custody of the court, after all the rights of the parties have been fully disclosed.

Mr. *Scott*, on behalf of Cocker, did not seek for any portion of the fund brought in by the receiver in the first cause, but contended that he was entitled to the sum realized by the receiver in his own cause, and that the mortgage of 26th of June, 1824, was taken by Cocker only as a further security, and could not have the effect of displacing his prior demand, except in the event of his being paid under the mortgage deed.

In the course of the argument his Lordship having put it to the counsel, whether he had jurisdiction to decide the question in this case without requiring Houlditch to file a supplemental bill in order to make Salt and Cocker parties to his suit, the several counsel expressed their desire to have the case disposed of upon the present motions.

THE LORD CHANCELLOR:—The court will not now decide this question, but I understand that all parties are anxious that I should decide \*this on motion, which I would not do without their consent. It is quite clear that no decree would have been asked against Lord Donegall compelling him to bring into account the rents he has received, so that these rents, but for the diligence of individual creditors, would have passed into his hands, and Houlditch would have had no remedy against him. The individual creditors by their proceedings have prevented this, and therefore have a right to the fruits of their diligence. The forms of the court here are different from what they are in England; here generally a receiver is not appointed over the whole estate, but only over a portion sufficient to answer the demand of the particular creditor; that was followed

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in this case; but if the individual creditor had been considered as suing on behalf of himself and the other creditors, the receiver should have been appointed over the whole estate, and Houlditch would then have stood in the same situation as the rest of the creditors; but the court by limiting the receiver to a part only, to satisfy the demand of the particular creditor, appears to have decided that he alone should have the benefit of that particular fund. The decree in the House of Lords, which, I must say, appears to me a proper decree, reversing Lord Plunket's decision, leaves this question untouched. Mr. Houlditch, notwithstanding many difficulties, obtained at an early period a decree against Lord Donegall in the place of the original plaintiff, establishing the rights of the creditors against the estates comprised in the trust deed of 1799, which decree was in effect inoperative, as the court had no power to enforce its decree against lands not \*within its jurisdiction. Mr. [\*92] Houlditch was compelled to have recourse to this court, which was bound to give effect to that decree; when he filed his bill in this country, every suit here was a *lis pendens* to him and was notice to him of the proceedings in the cause. He knew, therefore, the situation of the parties applying for a receiver, and when he prayed to have the decree of 1827 carried into effect, he should also have asked for relief as to the rents to accrue due between the period of the filing of the bill and of the decree being pronounced. In the mean time certain proceedings were taken in this court by the other creditors, and he now says that these creditors ought not to have the benefit of their diligence; to this I answer—that Salt and Cocker should have been made parties to his suit, to prevent them from taking the ordinary steps to make available for their own benefit the common fund for all the creditors, which the court would then have been bound to have administered for the benefit of all. There was nothing to prevent his doing so.

When the cause came on before the House of Lords it was peculiarly circumstanced. The three cases stood in the paper following each other; Salt's cause was, I think, heard before

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Houlditch's case came on, and the House of Lords affirmed the decree in Salt's case, granting him a receiver over a particular portion of the trust estate to liquidate his own demands. I must consider that the House of Lords by affirming the decree in Salt's case established his right as an individual creditor.

The House of Lords reversed the decree in Houlditch's [\*93] case, and \*directed that a receiver should be appointed over all the estates, for the benefit of all the creditors, speaking from the period when the decree should have been rightly pronounced in the Irish Court of Chancery. It is one thing to give effect to a foreign decree so as to enforce it against lands here, but it is a different thing to give it operation in such a way as to strike at every prior right established in this court; the effect would be this—suppose a man filed his bill, and obtained a decree in 1820 in England, he might delay proceeding in the cause until 1830, and then desire to unravel all that had been properly done during the intervening ten years in this court having perfect jurisdiction: and this court might now be asked to reverse its own decree in order to give effect to a decree of a court not having any jurisdiction here.

The decree of the House of Lords shows me that it was prospective only, and if Houlditch had his equity he should have asked for relief upon it by his bill, or he should now file his bill for that purpose, but if he were to file such a bill it appears to me he would not succeed; Houlditch throughout was a vigilant creditor, and was ably advised in this country, and yet when he filed his bill here he took no step to have the by-gone rents secured. This point could not have escaped the counsel he consulted, and he must be considered to have made his election, and to have confined himself to the future rents. The notice of the motion at the Rolls I consider to be an intimation of the opinion of his counsel; it states that he will move for liberty to [\*94] file a supplementary bill, and though this \*does not conclude the question, yet it shows strongly the opinion of his counsel. The only question is, whether by establishing rights in 1834, you are at liberty to go back to a period previous

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to the pronouncing of the decree. There was no application against Lord Donegall for the rents received by him, which would remain in his hands, and if we assimilate this to a mortgage it would be impossible for this creditor to recover them, even though they were in the custody of the court, without an order attaching the rents specifically, or his having obtained a receiver. I do not decide upon the right of Salt under the decree; the Lords I conceive decided that question, and I have no right to impeach their decision. Does the decree in Houlditch's case establish the right to stay or call back the payment of these past rents? My opinion is that it does not, but I would not be understood to decide this point at present. However, if I see no reason to alter my opinion, I shall stay the proceedings and discharge the receivers, who have not been rightly appointed, and I shall give effect to the decree of the House of Lords, by considering their decree as that which Lord Plunket ought to have pronounced, and by discharging the receivers from that period; and the rents from that time will belong to the general body of the creditors; but I shall let each retain that portion of the fund brought in by the receiver in his own cause prior to that period. The Court of Appeal has decided that proposition. If the Court of Chancery in Ireland had pronounced the proper decree Houlditch would then have had a receiver. Houlditch's order, therefore, for a receiver should operate from the \*time that decree was pronounced, for nobody can doubt [\*95] that the party is entitled to the benefit of the decree which should have been pronounced.

*26th January.*—THE LORD CHANCELLOR:—In *Salt v. Donegall*, and two other causes, in which I reserved giving my judgment, after having had an opportunity of reconsidering the case, I see no reason to alter my first impression. But the case does not depend on the points which have been so ably argued, but on the judgment of the House of Lords pronounced in Houlditch's case. The trust deed of 1799, provided an estate as a common fund for all the creditors, and this court held, and I must take it that it properly held, for the decree was affirmed in the House of Lords,



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that any individual creditor might come in to sustain his individual demand. In 1827 a decree was pronounced in England to carry into execution the trusts of the deed of 1799, and supposing the estates to have been situated in that country, that decree would have operated to bind those estates from the time it was pronounced, but in consequence of the Court of Chancery in England not having jurisdiction over lands in this country, it was found necessary to come into this court to enforce that decree. That cause came on before Lord Plunket on the 23d of January, 1832, and the bill was dismissed on the ground that it was not competent for the court here to aid the jurisdiction of the Court of Chancery in England; there was an appeal [\*96] from that decision, and the House of Lords reversed that decree. The decree of the House of Lords is somewhat ambiguous, and that ambiguity arose from these circumstances, that Houlditch did not make Salt and Cocker parties to his suit, and that he did not pray, for the benefit of the general body of the creditors, for an account of the rents collected and secured by the diligence of the individual creditors. The House of Lords made this order. [His Lordship here read the order of the 29th July, 1834.] This is a substantive declaration on which I am bound to act, and I am relieved from the difficulty of deciding whether I can assume this jurisdiction on motion, as all the parties desire that I should do so. The decree was reversed, and after declaring that the Court of Chancery here was bound to give aid to the Court of Chancery in England, it therefore ordered that it should be referred to one of the Masters of the Court of Chancery in Ireland, to appoint a proper person to be a receiver over the estates comprised in the deed of 1799. This court cannot appoint a receiver retrospectively, the other creditors not being parties. There being no injunction to restrain Lord Donegall, it cannot be said that he was bound not to interfere. Before the bill was filed in Ireland by Houlditch, the other creditors, through the medium of receivers, proceeded to obtain the rents for their own benefit, and between 1832 and 1834 realized a fund amounting to about 5,000*l*. Can the individual creditors now be called on to refund this sum? It is a settled point that

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a mortgagee has no claim against \*a mortgagor for by- [\*97]  
gone rents;(a) and although they are in the custody of  
the court, if they are not appropriated for the benefit of the indi-  
vidual creditor he has no right to them; if a bill had been filed  
by Houlditch against Lord Donegall and the individual creditors,  
stating the decree, this court would have been bound to give  
effect to that bill, and the 5,000*l.* would have belonged to the  
general body of the creditors. The House of Lords in an equity  
cause necessarily decides what should have been done at the  
period of the decree being pronounced in the court below, not as  
having original jurisdiction, not as a court of law, but as a court  
of equity, and its decree must be considered as that which the  
judge below ought to have pronounced. If the court below dis-  
misses the bill when it ought to have granted a receiver, it may  
be beyond the power of the creditor to get back the rents; but  
after the decision of the House of Lords, which says that Houl-  
ditch ought to have been decreed a receiver, can I, when that  
order was made in the House of Lords, say that I, sitting here as  
judge, am not bound to give all the effect that circumstances will  
enable me to give to that order? I find that 5,000*l.* is in the  
power of the court, by the exertions of individual creditors who  
are provided for by the decree of 1827, and come in *pari passu*  
with Houlditch, and to this fund I think he is entitled to  
the same \*extent as if the decree had been properly made [\*98]  
by my predecessor, that is, to so much of the fund as  
arose after the decree was pronounced. I decide this case on  
that ground alone; I shall give Houlditch the costs of this mo-  
tion; I cannot make the party pay for the error of the judge;  
on the same principle the Court of Appeal does not give the costs  
of appeal. I am only to carry into effect the decree of the Lords,  
and by a clause in their order further consideration and directions  
are reserved; this court, therefore, has full jurisdiction to carry  
it into effect. I shall stay all further proceedings in both the  
other causes, and discharge the receivers in those causes. Salt's

(a) In addition to the cases cited in the argument see the cases collected in the  
note to *Gresley v. Adderley*, 1 Swans. 579; and also *Walker v. Bell*, 2 Mad. 21, and  
*Delany v. Mansfield*, 1 Hogan, 234.

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and Cocker's costs, including the costs of the present proceedings, to be paid out of the fund, and if Lord Donegall has been served, the costs of all parties are to be paid out of the fund in court, (having been incurred in suits properly instituted), and the ultimate balance to be carried over to the credit of the third cause.

"Reg. Lib.—The six clerk for defendant, the Marquis of Donegall, admitting notice, and no counsel appearing for said defendant, and the plaintiffs in the three causes, by their counsel in open court, desiring that all questions touching the fund now in the Bank of Ireland to the credit of the first and second causes shall be now disposed of by the court on motion, without requiring the plaintiffs in the third cause to file a supplemental bill to make plaintiffs in said first and second cause parties in said third cause. Declare that in execution of the judgment in the House of Lords, bearing date 29th July, 1834, pronounced [\*99] \*in said third cause, that all further proceedings in said first and second causes are to be, and they accordingly are hereby stayed, with liberty to plaintiffs therein respectively to come in under the decree in the third cause and prove their demands as they may be advised; and let the receivers theretofore appointed in said first and second causes forthwith account; and let their respective balances be paid into bank to the credit of said third cause, and thereupon let said receivers be discharged; and declare the plaintiffs in said first and second causes entitled to their costs incurred in said causes *in this court*, and refer it to the Master to tax and ascertain said costs accordingly. Let the Accountant-General draw on the bank in favor of plaintiffs in said first and second causes, or their attorneys thereto lawfully authorized for the amount of the said costs when taxed and ascertained. Declare the plaintiffs in said third cause entitled to their costs of this motion, and refer it to the Master to tax the same; and let the Accountant-General draw on the bank out of said fund in favor of said plaintiffs in the third cause or their attorney authorized, for the amount of said costs when so taxed and ascertained; and after payment of said several costs out of said fund so standing to the credit of the said first and second

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cause, let the Accountant-General transfer the balance which shall remain of said fund to the credit of said third cause, same to be invested in government stock with the Master's approbation, and to abide the further order of the court to be made in respect thereof."

\*The Lord Chancellor(a) this day(b) varied the above [\*100] order in these causes, by directing that the Master in proceeding thereunder should allow to the plaintiff in the first cause the sum of 400*l.*, the amount of the appeal costs awarded to him by the House of Lords, on the appeal of the *Marquis of Donegall v. Salt and others*, in addition to the costs awarded to the said plaintiff in the first cause by said order of the 26th of January, 1835, but affirmed the order in all other respects.

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\*RIKY v. KEMMIS.—KEMMIS v. RIKY. [\*101]

1835: 23d and 26th January.

A. R. having bequeathed his personal estate, subject to the payment of his debts, to two trustees, H. and N., upon trust to place out at interest such money as he should die possessed of, and at their discretion to continue at interest the several sums then standing out at interest, and out of the produce of his personal property to pay his wife R. R. a legacy of 4,000*l.* and an annuity of 200*l.* per annum, and the residue to his daughter, appointed his wife R. R. executrix, and the said H. and N. executors. The testator died in 1796. R. R., H. and N. proved the will, but N. never acted. In 1797 a settlement was executed on the marriage of the testator's daughter with T. K., to which R. R. was a party, and in which there was a covenant by all the parties thereto, that the residue should be ascertained and paid over within a year to the trustees of the settlement: H., who had been the banker and agent of the testator, but was indebted to him at the time of his decease, was allowed by the executrix R. R. to have the sole management of the assets, which, at the time of the testator's death, were sufficient to pay all demands. H. at different times advanced out of the testator's assets several sums, the interest of which T. K. was permitted to enjoy, and in 1812, became a bankrupt, whereby a large portion of the assets was lost; it appeared from his books that he had made entries appropriating those several sums to the uses of the settlement of

(a) Lord Plunket.

(b) 2d July.

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1797. R. R. proved under the commission as executrix, and in the account which was furnished to her by H. and annexed to her deposition, made on the occasion of so proving, referred to the bankrupt's books. Held—that as it was her duty to have examined those books, she was bound by the entries made therein, and that the appropriations must be considered as made with her privity and concurrence, and consequently that she had forfeited her right to be paid the sums due to her under the will of the testator out of the funds so appropriated.

If a tenant for life, bound to keep down an annuity, be permitted by the executrix to receive the rents without performing the obligation, and the executrix pays the annuity, she cannot afterwards recover any portion of the past payments out of the general personal property which has been appropriated.

ARTHUR RIKY by his will, bearing date the 5th of August, 1796, devised and bequeathed to Thomas Needham and Charles Haskins his leasehold holdings and interest at Airfield in the county of Dublin, upon trust for his wife Rachael for [\*102] life, and after her decease to merge \*in the residue of his fortune; he then gave to his trustees, the said Thomas Needham and Charles Haskins, "all his personal estate and fortune, money and securities for money, subject to the payment of his debts and funeral expenses, upon trust, to place out at interest on public or private security or securities, as soon as might be after his decease, such money as he should die possessed of, and at the discretion of his said trustees to continue at interest, the several sums then standing out at interest, or otherwise to call in the same, as to them should seem fit, and again to lay and place out the same at interest;" and out of the produce of his said personal estate he directed his said trustees to pay his wife Rachael 4,000*l.*, in addition to a sum of 1,000*l.* provided for her by her marriage settlement; and the testator also devised and bequeathed to the said trustees his several freehold and leasehold holdings at Spitalfields, Mill street, Camden street, Harcourt street, and in the County of Wexford, upon trust for his daughter Mary, for her sole and separate use, and after her decease for her issue, as she should appoint, and in default of appointment to and amongst such issue equally. He then gave the *residue* of such estate and fortune as he should die possessed of to his said daughter Mary, her heirs, executors, &c.; and appointed his wife Rachael executrix, and the said Charles Has-

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kins and Thomas Needham executors; and by a codicil to his will, he bequeathed an annuity of 200*l.* per annum to his wife, to be paid to her by his trustees out of his personal estate.

\*The testator died shortly after the execution of his [\*103] said will, leaving his daughter Mary his only child. The will was proved by Rachael Riky, Thomas Needham and Charles Haskins; but Haskins alone called in and collected the personal estate of the testator and discharged his debts, legacies, &c. Needham never interfered with the assets, and died in the year 1806.

In the year 1797 Mary Riky, the daughter of the testator, intermarried with the Rev. Thomas Kemmis; and previous to the marriage a settlement was executed on the 2d of November, 1797, between Thomas Kemmis the elder and the said Rev. Thomas Kemmis, his eldest son, of the first part, Rachael Riky (the testator's widow), Thomas Needham and Charles Haskins (the said Rachael Riky being described as executrix, and the said Thomas Needham and Charles Haskins as the executors and trustees named in the will of said A. Riky), and the said Mary Riky of the second part, Henry Kemmis and John Riky of the third part, and others of the fourth part, by which, after reciting the said will, and that the said Rachael Riky, Thomas Needham and Charles Haskins had duly proved the same, and had proceeded to act in the trusts reposed in them by said will, but that the amount of the residuum devised and bequeathed to the testator's daughter Mary, could not be then ascertained; and after reciting that Thomas Kemmis was seised in fee of certain lands in the Queen's County; and that a marriage was intended to be solemnized between the Rev. Thomas Kemmis and the said Mary Riky; the said \*Thomas [\*104] Kemmis, the elder, conveyed the said lands in the Queen's County to the trustees upon the ordinary trusts. And it was thereby "covenanted, agreed and declared by and between all the parties thereto that the residuum of the personal estate, to which Mary Riky was entitled under the will of her

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father, should be ascertained before the end of a year from the date of the marriage, and be paid over to Henry Kemmis and John Riky, their executors, administrators and assigns," upon trust to pay the interest to the Rev. Thomas Kemmis (the intended husband) during his life; and after his decease to Mary (his intended wife) for her life; and after the death of the said Thomas and Mary upon trust to pay over the said residuum to such child or children of the marriage as the said Thomas and Mary should appoint, and in default of appointment, amongst the children equally; and the trustees Henry Kemmis and John Riky were empowered, with the consent of said Thomas and Mary, to permit the said residuum either to remain out upon the securities in which the same should be invested at the time of assigning the same to the said trustees, or to call in said residuum and invest it in public or private, real or personal securities.

There was issue of said marriage three sons, and one daughter, Mary, who was subsequently married to Charles Hogan.

On the 23d of June, 1798, Charles Haskins paid out of the assets of the testator, A. Riky, a sum of 2,175*l.*, which [\*105] \*was invested in the purchase of 4,200*l.* three per cent consols; the interest of which was paid to the Rev. Thomas Kemmis, the tenant for life, from the year 1798 down to his death in 1827. On the 2d of May, 1802, Haskins advanced out of the assets a further sum of 2,000*l.* to the Rev. Thomas Kemmis, which, together with a sum of 2,000*l.* belonging to the latter, was laid out by him in the purchase of the estate of Brockley Park, in the name of a trustee, William Kemmis.

By a deed of the 19th of August, 1808, made between the Rev. Thomas Kemmis and Charles Haskins, as surviving trustee in the will of the late A. Riky, reciting the said will, and that said Charles Haskins had agreed to lend a sum of 2,000*l.*, part of the personal estate of the said testator, the said Rev. Thomas Kemmis, in consideration of that sum, mortgaged the estate of

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Brockley Park to Charles Haskins, to hold the same upon the trusts and subject to the several uses and purposes of the settlement of the 2d of November, 1797: it appeared that the Rev. Thomas Kemmis was allowed to retain the interest of this sum of 2,000*l.* during his life.

On the 24th of December, 1805, Haskins again advanced out of the assets a further sum of 610*l.* to the Rev. Thomas Kemmis, with which the latter purchased the ground rent of the premises in Camden street. These premises were charged with an annuity of 80*l.* per annum to Mrs. M'Nab, granted to her by the testator, A. Riky, by a deed executed prior to his marriage. On the \*28th of November, 1810, the Rev. Thomas [\*106] Kemmis executed a mortgage of the said premises in Camden street to Charles Haskins, described as the surviving trustee in the will of the said A. Riky, to secure a sum of 610*l.* This rent was paid to Mrs. Kemmis during her life, and after her death in 1812, was regularly invested and formed part of the accumulated fund hereafter mentioned.

In the year 1812 Charles Haskins became a bankrupt, having at that time in his hands a balance of the assets to the amount of 4,486*l.* 15*s.* 11*d.* Rachael Riky proved under the commission, and a dividend was paid to her amounting to the sum of 1,283*l.* 17*s.* 4*d.* Mary Kemmis (the testator's daughter) died in the year 1812, and the Rev. Thomas Kemmis (her husband) in the year 1827, neither of them having executed any power of appointment; and H. Kemmis and Mary Kemmis, the younger children, were, upon the death of their father (the Rev. Thomas Kemmis), made wards of court.

By a report made in the matter of the said minors on the 16th of November, 1827, and to which Rachael Riky, their grandmother, was a party, the Master found that each of the minors was entitled, under the will of the grandfather (the testator A. Riky), to one fourth of the rents and profits of certain premises in Harcourt street, Camden street, Mill street, Spitalfields, and in



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the County of Wexford ; together with the *accumulations* thereof since the death of their mother in the year 1812 ; and also to one fourth of the residue of the estate of their grand-  
[\*107] father, and \*the accruing interest and dividends since the death of their father ; and that the residue then consisted of 4,200*l.* three per cent. consols, standing in the names of Henry Kemmis and Charles Haskins, the trustees mentioned in the settlement of 1797 ; and that each of the minors was also entitled to one fourth of a certain leasehold interest at Airfield. But no notice was taken in the said report of said sums of 2,000*l.* and 610*l.*, or of the mortgages by which those two sums were respectively secured.

Shortly afterwards, Mary Kemmis (the daughter of the Rev. Thomas Kemmis), being still a minor and ward of the court, was married to Charles Hogan ; previous to which (on the petition of Rachael Riky and said Charles Hogan), an order was obtained, by which it was referred to the Master to settle and approve of a proper settlement, and on the 28th of December, 1827, a settlement was accordingly executed, to which Rachael Riky was a party, as the guardian of the person of the said minor, Mary Kemmis, wherein the property to which the minor Mary was entitled, was recited in the terms of the report of the 16th of November, 1827.

On the 2d of August, 1828, Rachael Riky filed her bill, praying for an account of the personal estate of the testator, A. Riky, and an account of what remained due to her on foot of her marriage settlement, legacy and annuity, under the will and codicil of said A. Riky, and that she might be declared entitled  
[\*108] to be paid the amount \*which should be found due to her out of said sums of 2,000*l.*, 610*l.* and 4,200*l.* three per cent. consols, and that a fund might be provided for the payment of the accruing gales of her annuity. She died in 1829, and the suit was revived by William Hogan, her personal representative. On the 11th of November, 1829, T. Kemmis, grandson of the testator, filed a cross bill against the said Rachael Riky,

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and both causes were heard in November, 1831, when it was referred to the Master to make certain inquiries.

The Master accordingly made his report on the 28th of October, 1834, finding that there was due to the petitioner, William Hogan, as executor of Rachael Riky, on foot of the legacy of 4,000*l.*, the sum of 800*l.* 8*s.* 11*d.* for principal; and 210*l.* 3*s.* 4*d.* for interest, from the 1st day of November, 1827; and that there was also due to him as such executor, on foot of the annuity of 200*l.*, the sum of 3,230*l.* 15*s.* 4*d.* up to 1st of November, 1829, the last gale day previous to Rachael Riky's decease; but that no part of said sums, or of either of them, was due or payable by any of the parties in these causes. The Master further found that the said Rachael Riky, after the bankruptcy of Charles Haskins, paid to Mrs. M'Nab, from time to time, on foot of the annuity of 30*l.* per annum charged on the Camden street premises, a sum of 440*l.* He also found that, on the day of the execution of the said settlement of 1797, there was due by the said Charles Haskins, to the estate of the testator (the said A. Riky), the sum of 13,524*l.* 6*s.* 2*d.*; which was composed \*of [\*109] the following sums, viz., 5,524*l.* 6*s.* 2*d.* on foot of his running account, 7,250*l.* on foot of his bond and warrant, and 750*l.* on foot of a mortgage. That the said Haskins was a merchant of extensive trade and great credit, in whom the said Arthur Riky in his lifetime had the utmost confidence, with whom he dealt as his banker, during his life; and that after the death of the said A. Riky the said Rachael (his widow) had equal confidence in said Haskins, permitted him to retain in his hands great part of the property of the deceased, dealt with him as her banker, and allowed him to manage all her own pecuniary concerns and those of the other legatees. He also found that the sums of 2,175*l.*, laid out in the purchase of 4,200*l.* three per cent. consols, and the said sums of 2,000*l.* and 610*l.*, were appropriated to the trusts of the said marriage settlement of 1797, as and for the residue or part of the residue of the assets of said A. Riky, bequeathed to his said daughter; and that the said payments and all other items of the executorship account were from time to

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time entered in the books of the said Haskins; and balances regularly struck and carried forward from page to page of said books, so as to form a continued chain of said accounts, with references forward and backward, so that any person looking at any page of said account had full information and notice how and where all the rest of it was to be found. That the said Haskins, in 1812, became a bankrupt, and that, upon striking a balance on said executorship account, it turned out that he stood indebted on foot of said account in a sum of 4,486l. 15s. 11d.; *that at that time all the debts of the said testator, A. Riky,* [\*110] *had been long \*paid off,* and that there was no demand on said balance save the annuity of 30l. per annum to Mrs. M'Nab, and the sum of 1,476l. 10s. due upon the legacy to said Rachael Riky, and her annuity of 200l. And, inasmuch as the said Rachael Riky, as executrix of the said testator, A. Riky, proved the said debt in the matter of said bankruptcy, and received the dividends thereon, amounting to 1,233l. 17s. 4d., and as her deposition referred to the book of said Haskins, in which the said balance was struck on foot of said executorship account, and it appeared thereby that she had full notice of the said account, and of all the payments so entered therein; and as she continued afterwards to pay the said Mrs. M'Nab, and acquiesced in the loss she had sustained without complaint, until the filing of her bill; the Master, from these circumstances, as well as from direct evidence laid before him, was of opinion and found that the said three several payments of 2,175l., 2,000l. and 610l., and all the other payments in said executorship account contained, were made with the said Rachael Riky's consent and concurrence, and with full notice of all the facts; and that the said three several sums were, with her privity and consent, appropriated to the trusts of the said marriage settlement, by reason of her entire confidence in the said Haskins, and her conviction of the sufficiency of the fund still in his hands to secure her rights and those of Mrs. M'Nab; that her representative, therefore, had now no claim on the three sums so appropriated, and that the entire loss suffered by the bankruptcy of the said Haskins should fall upon the estates of the said Rachael Riky; but that the

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\*said Rachael could not be considered as having been [\*111] guilty of any default in having allowed the same to remain in the hands of the said Haskins.

To this report Hogan, the executor of Rachael Riky, excepted, on the ground that there was no sufficient evidence laid before the Master to support such finding, and that it did not appear that said Rachael Riky ever saw the books of account of said Charles Haskins, or any account relating to said executorship, except an account on a sheet of paper referred to by her deposition; or that she had any knowledge out of what fund her annuity or the interest of her legacy was paid, or of the payment of said sum of 2,175*l.*, or of any circumstances connected therewith, until the month of November, 1827; or of the payment of said two sums of 2,000*l.* and 610*l.*, or of any circumstances connected therewith, until after a bill<sup>(a)</sup> had been filed against her on the 25th of February, 1828, in the name of her grandson, the defendant, H. Kemmis the younger, who was then a minor, charging her with waste and misapplication of the assets of the said testator A. Riky.

On the part of the plaintiff; W. C. Hogan (the father of the said Charles Hogan) was examined, who deposed that he had acted as confidential attorney to Haskins, as well on his own account as in his character of executor and trustee of the testator A. Riky; and that he also acted \*as solicitor [\*112] to Rachael Riky from the time of her husband's death. That it had been the intention of the trustees of the settlement of 1797 to have proved the debt due by Haskins to the estate of the testator A. Riky, but on consultation it was considered it would save expense if Mrs. Riky would come forward and prove the debt, and apply the dividends in part discharge of her legacy; that she accordingly proved under the commission at the request of Thomas Kemmis the elder, and the Rev. Thomas Kemmis; but that she did not at once agree to prove, and required time to consult with Thomas Kemmis the elder. He also de-

(a) This suit was not prosecuted.

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posed that the account books were never in his custody until after the death of Haskins, when he received them from his widow, and that they were never seen by him (the deponent) until after the final examination in 1813.

The following correspondence was likewise read. A letter, dated the 24th of June, 1813, from William Kemmis to W. C. Hogan.—“I understand you have put in a claim to Mr. Haskins' commissioners, on the part of Mrs. Riky, for the balance due by Mr. Haskins to the fund arising from the late Mr. Riky's property; be so good as to let me know if it is the case, and if so, upon what grounds it is put in her name, as I conceive it should be in the name of the trustees of the settlement.”

A letter dated May 22d, 1813, from William Kemmis to Charles Haskins, requesting an account of the trust money.

Another, dated the 22d May, 1813, from Haskins to [\*118] \*W. C. Hogan, enclosing the account referred to by Mrs. Riky in her affidavit.

“I enclose a note from Mr. William Kemmis, but before I would return an answer, shall be much obliged by your acquainting me whether Mrs. Riky, as executrix of the late Mr. A. Riky, is to claim on the enclosed account, or the trustees named in the marriage settlement of the latter: I suppose there may be no hesitation in sending it to Mr. William Kemmis.”

On the part of the defendants (the 'Kemmis'), a number of entries were read from Haskins' account books, which purported to be debtor and creditor accounts between him and the executors of A. Riky, of which the following are the most material.

“23d February, 1798.—To paid into the hands of Thomas Kemmis, Esq., to purchase in the three per cent. consols in England, in the name of the trustees named in the marriage settlement of the Rev. Thomas Kemmis with Miss Mary Riky, 2,175*l*.

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"21st May, 1802.—To my note to Thomas Kemmis, Esq., at thirty-one days from this date, for 2,000*l.*, which sum is to be laid out to and for the uses, trusts and purposes mentioned in the marriage settlement of the Rev. Thomas Kemmis with Miss Riky, the daughter of A. Riky. (See trustees' receipt on the file), 2,000*l.*

\*"24th December, 1805.—To cash paid the Rev. [\*114] Thomas Kemmis, to purchase the ground in Camden street, on which five houses stand belonging to the late A. Riky, 610*l.*

"N. B.—The Rev. Thomas Kemmis is to give the executors of the late A. Riky a mortgage of same for 610*l.*"

In a subsequent part of the account book there were similar entries, referring to the pages in which those above mentioned appeared; and among them (on the credit side) was the following:

"By the Rev. Thomas Kemmis' mortgage of Breckley Park, bearing date the                      day of                      for the debited sum of 2,000*l.*

"N. B.—No bond was given."

And also this memorandum: "OBSERVE.—That the following sums of—2,175*l.*, 2,000*l.*, and 610*l.*, are not to bear interest, as the interest arising from the sums funded, and the ground rent of Camden street, added to the yearly surplusage on the estate of A. Riky, was given to Mrs. Mary Kemmis as the appropriated yearly sum named in the will of her father A. Riky, Esq."

The affidavit made by Rachael Riky, in order to prove under Haskins' commission (in which she was described \*as widow and executrix of the testator A. Riky), stated [\*115] that Haskins was indebted to her as executrix of the said testator in the sum of 4,486*l.*, being the balance remaining

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due on foot of an account current for money had and received by said bankrupt, the property of the said A. Riky, *as appeared by an account thereof in the handwriting of the said bankrupt signed by the deponent.* The first entry in the account so referred to was as follows.

*"February the 22d, 1812.—To balance of interest, as appears in the executor's book, page 76—266l. 5s. 5d."*

With respect to Mrs. M'Nab's annuity, it appeared that up to the time of Haskins' bankruptcy it had been paid by him out of the general assets; and that the rents of the Camden street premises, upon which this annuity was charged, had been paid to the Rev. Thomas Kemmis, on the production of his wife's receipts, as part of her separate estate; that after Mrs. Kemmis' death, these rents had been received and invested for the benefit of Mrs. Kemmis' children; and that Mrs. Riky, out of the dividend of 1,233l. 17s. 4d. continued to pay the annuity to Mrs. M'Nab until the year 1828. Mrs. Riky charged in her bill that she had made such payments out of the dividend, conceiving she was liable thereto as executrix, not being aware that she could have resorted to the premises charged therewith; that the sum due to her on foot of her legacy ought therefore to be increased by the amount of the payments so made by her on foot of the said annuity.

[\*116] Mr. Warren, Mr. Ball, and Mr. Hogan, for the plaintiffs in the first cause.

There are two questions to be considered; first, whether there was any appropriation of the several sums to the uses of the settlement of 1797; and, secondly, if there was an appropriation, was it with the privity and concurrence of Mrs. Riky. In the first place, we contend that there was no appropriation of any of these sums; the sum of 4,200l. consols was not invested in the names of the two trustees of the settlement, Henry Kemmis, and John Riky, as it ought to have been, if it were intended to ap-

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propriate that sum to the uses of the settlement; as to the other two sums of 2,000*l.* and 610*l.*, Haskins never parted with his dominion over them, and by taking mortgages as securities it is evident he considered them as mere loans. Secondly, admitting that the acts of Haskins amount to an appropriation, and even that there was an intention on his part to appropriate these sums, there is no evidence to show that the payments by him were made with Mrs. Riky's privity or concurrence, except the mere inference from her deposition at the time of Haskins' bankruptcy, in which she referred to the annexed account; and as the account referred to the books, the Master has drawn the conclusion, that Mrs. Riky had full notice of every item and entry in the books. Mrs. Riky could not have seen the books after the bankruptcy, as they were immediately taken possession of by the assignees, and no person was allowed access to them except Haskins, who made out the account annexed to the deposition, and \*handed it over to Hogan, to enable [\*117] Mrs. Riky to prove under the commission. But even if Mrs. Riky had seen Haskins' account books prior to the bankruptcy, the entries were not such as to have induced her to suppose that there was an absolute appropriation, but only an appropriation subject to her rights; and in fact it is not now sought to disappropriate those sums, but to leave them to the uses of the settlement of 1797, subject, however, to Mrs. Riky's prior claims which had attached upon them. It can never be contended that by becoming a party to the settlement of 1797, she thereby intended to abandon her paramount rights to the residue either as legatee or annuitant; and though the account furnished by Haskins might have directed her attention to the books, yet that can only affect her with notice from the time of the bankruptcy, and not from the time the alleged appropriations were made by Haskins, which was many years previous. If there has been any default, it has been on the part of the trustees and not of Mrs. Riky. The directions in A. Riky's will are, that the trustees, not that the executors, should act in the disposal of the property. They, and not the executors, were given complete and exclusive dominion over the testator's personal



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estate, and were empowered to place it out at interest on public or private security; as executrix Mrs. Riky had no control over the fund, she cannot, therefore, be held responsible for Haskins' acts; *Doyle v. Blake*.<sup>(a)</sup> The only act she did in her [\*118] character of executrix was to prove the \*will. She was selected to prove under the commission, merely *pro forma*, and to save expense. Whatever may be the opinion of the court as to Mrs. Riky's claim on foot of the legacy, the sum of 2,175*l.* is still subject to the payment of the arrears of her annuity, which was a continuing charge and which she never released. Mrs. Riky being ignorant that the annuity of 30*l.* a year, payable to Mrs. M'Nab, was charged on the Camden street premises, continued to pay it out of the assets of the testator, from the year 1812; it is but just, therefore, that her estate should be repaid the sum so expended by her.

The *Attorney-General*, Mr. Martley, and Mr. Holmes for Thomas and Henry Kemmis.

The entries in Haskins' book show that the 4,200*l.* consols were appropriated to the uses of the settlement of 1797. Mrs. Riky must be taken to have waived her claims to that sum, by being a party to and acquiescing in the report of the 16th November, 1827, in which the sum of 4,200*l.* consols was stated to be part of the minor's property; and also by being a party to the settlement of 1827, by which one fourth of that sum was conveyed to trustees to the uses of that settlement. As to the sums of 2,000*l.* and 610*l.*, advanced for the purchase of Broughley Park, and the premises in Camden street, the entries in Haskins' book show that they were part of the residue, and that they likewise were appropriated to the uses of [\*119] the settlement of 1797. A further sum of 440*l.* \*is claimed on account of payments made by Mrs. Riky to Mrs. M'Nab, in discharge of her annuity on the Camden street premises; Mrs. Riky having made these payments voluntarily, without any suit instituted by the annuitant to

(a) 2 Sch. & Lef. 231.

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compel her to do so, she is not entitled to be recompensed; and by her own acts she has waived her claim to this sum also, inasmuch as by the report of November, 1827, each of the children was declared entitled to one fourth of these premises, together with one fourth of the accumulations from the death of their mother; and by the settlement of 1827, her granddaughter's share of the accumulated fund (in which were included the rents of the Camden street premises) was settled without any qualification, and to each of these she was a party. It must be presumed that Mrs. Riky, in discharge of her duty as executrix, had full knowledge of all Haskins' dealings with the assets; she had abundant means of information in her power; W. C. Hogan was solicitor both for her and for Haskins, and was the person who prepared and witnessed the two mortgages, by which the sums of 2,000*l.* and 610*l.* were secured; besides in her deposition she refers expressly to the page in the account book, in which are entries of the several appropriations. Pursuant to the covenant in the settlement of 1797, it was her duty to have had the residue ascertained; but, instead of so-doing, she kept a debtor and creditor account with Haskins, as her banker, and left him an uncontrolled dominion over the funds; the consequence of her conduct was a loss of 4,000*l.* to the property by the bankruptcy; and any deficiency to meet her present demands has been occasioned by her own neglect. \*It is [\*120] admitted that, on the death of A. Riky, in 1796, there were ample funds for the payment of all demands; it was her duty at that time to have insisted on the legacy of 4,000*l.* being paid to her, and a sufficient sum allocated to secure the payment of her annuity, and having such a right, she permits Thomas Kemmis to deal with these funds as his own. For fifteen years she suffered Haskins to deal with the assets without any interference on her part; and, although the general rule is, that residuary legatees cannot call on particular general legatees to abate, yet, without contending for the principle to the extent laid down in *Dyose v. Dyose*,<sup>(a)</sup> it is now well established that if

(a) 1 P. Wms. 305. See observations on this case in *Fonnerneau v. Poynts*, 1 B. C. C. 478; *Humphreys v. Humphreys*, 2 Cox, 186; *Page v. Leapingwell*, 18 Ves. 466.

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the particular legatees have dealt with the executor, and there has been a loss occasioned by their own laches, they lose their priority and must abide the loss; *ex parte Chadwin*.<sup>(a)</sup> The present is even a stronger case, for here the particular legatee, after a specific allocation amounting to a payment, and an acquiescence for nearly thirty years, calls on the residuary legatee to abate.

*January 26th.*—Mr. William Brooke, in reply:—The testator reposed the utmost trust and confidence in Haskins, having employed him as his banker and agent during his life, and [\*121] by his will appointed him his executor\* and trustee; in all the cases in the books from *Churchhill v. Hobson*,<sup>(b)</sup> down to *Dorchester v. Effingham*,<sup>(c)</sup> an executor has never been held liable for having entrusted the person whom the testator himself had entrusted. The settlement of 1797 excluded Mrs. Riky from the exercise of any discretion over the funds, and transferred her authority to two new trustees who were empowered to call in the residuum. The notice to Mrs. Riky of the appropriations of Haskins, was at most a constructive notice; and, without full notice of all Haskins' dealings with the funds, acquiescence on her part is of no value, and does not amount to a waiver. *Can v. Can*<sup>(d)</sup> *Cholmondeley v. Clinton*<sup>(e)</sup> *Stackhouse v. Barnston*,<sup>(g)</sup> *Brookman v. Rothschild*.<sup>(h)</sup>

THE LORD CHANCELLOR:—I have not much difficulty in this case; nobody can doubt that Mrs. Riky, who was personal representative of her husband, may lose or waive her rights over the funds as legatee, by consenting to an appropriation; the only question is whether she has by her dealings lost or waived those rights. It has been argued that she was only an exe-

(a) 3 Swans, 380.

(b) 1 P. Wms. 241.

(c) Tam. 279. See *Rowth v. Howel*, 3 Ves. 565; *Bacon v. Bacon*, 5 Ves. 331; *Joy v. Campbell*, 1 Sch. & Lef. 342; ——— v. *Walker*, 5 Russ. 7. See further *Pistor v. Dunbar*, 1 Anstr. 107; *Kilbee v. Sneyd*, 2 Molloy, 200.

(d) 1 P. Wms. 723.

(g) 10 Ves. 465.

(e) 2 Mer. 302.

(h) 3 Sim. 153–223.

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cutrix \*and not a trustee under the will, and that she [\*122] could not be made liable by merely allowing one of her co-executors to apply the fund. I entirely concur in that view; if the fund were in the trustees, and she were not allowed to see to the application of it; (a) but the question with regard to \*that point is this—were the trusts in the will sufficient [\*123] to authorize the executors to leave money in the hands of Haskins, who was largely indebted to the testator? The trustees are directed by the will to place out at interest, all the testator's personal estate on private or public security, and at their discretion to continue at interest the several sums standing out, or to call in the same and invest them. The clear meaning of

(a) Generally one executor will not be charged on account of the *devastavit* of his co-executor; *Harghorpe v. Milforth*, Cro. Eliz. 318; *Hawkins v. Day*, Amb. 162; *Littlehales v. Gascoyne*, 3 B. C. C. 73. But it is otherwise if he has concurred in the misapplication of the fund; *Hovey v. Blakeman*, 4 Ves. 596; *Brice v. Stokes*, 11 Ves. 319; or has done any act whereby the assets have got into the possession of his co-executor; *Murrell v. Cox*, 2 Vern. 570; *Chambers v. Minchin*, 7 Ves. 186; *Langford v. Gascoyne*, 11 Ves. 333; *Shipbrook v. Hinchinbrook*, 16 Ves. 477; *Underwood v. Stevens*, 1 Mer. 712; *Balchen v. Scott*, 2 Ves. 678, *contra*; in that case, however, the executor who handed over the fund to his co-executor, did not himself obtain it by any act of his own. But an executor will not be liable for a payment to his co-executor, out of the assets, for the express purpose of a special administration; *Bacon v. Bacon*, 5 Ves. 331; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Davis v. Spurling*, 1 Russ. & Mylne, 66; or if having no legal right to retain the funds he hands it over to his co-executor; *Davis v. Spurling*, 1 Russ. & Mylne, 64; or having disclaimed and renounced, applies it as the agent of the other who proved the will; *Doe v. Everard*, 1 Russ. & Mylne, 231; *Stacey v. Elph*, 1 Mylne & Keen, 195; otherwise if he has once acted; *Read v. Truelove*, Amb. 417; *Crosse v. Smith*, 7 East, 246; *Doyle v. Blake*, 2 Sch. & Lef. 245.

The old rule as to executors was, that if they joined in a receipt (as it is unnecessary) all were answerable, but not so as to trustees, who might have joined for conformity; *Sadler v. Hobbs*, 2 B. C. C. 115; *Belchier v. Parsons*, Amb. 219; *Leigh v. Barry*, 3 Atk. 584; see also the observations of Lord Redesdale, in *Joy v. Campbell*, 1 Sch. & Lef. 341; and in *Doyle v. Blake*, 2 Sch. & Lef. 242; but in the following cases the rule was relaxed in favor of executors, making its application depend upon the circumstances of each case; *Churchill v. Hobson*, 1 P. Wms. 243; *Westley v. Clarke*, 1 Eden, 357, approved of in *Hovey v. Blakeman*, 4 Ves. 608; *Scursfield v. Howes*, 3 B. C. C. 93; and although Lord Eldon for a long time struggled for the preservation of the old rule; see *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 324; *Shipbrook v. Hinchinbrook*, 16 Ves. 479; yet in *Walker v. Symonds*, 8 Swans. 64, he seems to consider the alteration as completely effected.

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this clause is, that the funds should be invested, and that does not justify the trustees in leaving the money in the hands of

Haskins.(a) Mrs. Riky was an executrix; Needham, [\*124] \*the other trustee, declined to act; Haskins was known

to be a debtor to the estate; and although it is truly alleged that the testator trusted him, yet it was with the check of Needham who was the joint trustee, and when Needham refused to act, the executrix was bound to see that there was some check upon Haskins. It never was the intention of the testator to entrust Haskins with the sole power over the property. The next question is, whether there has been such conduct on the part of Mrs. Riky as amounts to waiver or acquiescence; if she did acquiesce, when she was bound to take steps to assert her rights, the court will hold that she is barred, and not allow her now to set up those rights. It has been urged, that though she proved the will she did not act; but having proved, she was bound under the circumstances of this case to act, and to see that the funds which were placed in her power as executrix, reached the hands of the trustees, a duty she never performed.

[\*125] \*By the will of A. Riky, a considerable estate was given to his daughter, and 4,000*l.* to his wife, and by a codicil he directed an annuity of 200*l.* per annum to be paid to her out of his personal property; and in fifteen months after his death, Mrs. Riky, on the marriage of her daughter, joined the

(a) Executors lending the assets upon personal security shall be personally liable if the security prove defective; *Terry v. Terry*, Prec. Chan. 253; *Ryder v. Bickerton*, 3 Swans. 80, n.; *Adye v. Feuilleteau*, 1 Cox, 24, S. C. 3 Swans. 84, n.; *Holmes v. Dring*, 2 Cox. 1; *Wilkes v. Steward*, Coop. 6; *Vigrass v. Binsfield*, 3 Mad. 62; *Walker v. Symonds*, 3 Swans. 63; *French v. Hobson*, 9 Ves. 103; *contra, Harden v. Parsons*, 1 Eden, 145, which, however, must be considered as overruled. And it is the duty of the executor to call in money lent upon personal security; *Eagleton v. Kingston*, 8 Ves. 486; *Gaskell v. Harman*, 11 Ves. 498; and the executor will be chargeable with the loss if he neglect to do so; *Lowson v. Copeland*, 2 B. C. C. 156; *Powell v. Evans*, 5 Ves. 839. If the will contain a direction to the executors to lay out the money on real or personal securities, they would be justified as against legatees in lending it to any responsible person, provided they exercised a fair, sound and honest discretion; *Forbes v. Ross*, 2 Cox, 116; but not as against creditors; *Doyle v. Blake*, 2 Sch. & Lef. 239-240.

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other executors in executing the settlement of the 2d of November, 1797, both as legatee and personal representative; and in it she is described as co-executrix, and the others as executors and trustees; and there is also a recital to this effect, "that the said Rachael Riky, Thomas Needham, and Charles Haskins, have proved the said will, and have proceeded to act in the trusts reposed in them," &c. As executrix she had a trust reposed in her, and if on the marriage of her daughter she has chosen to join in executing an instrument which recites that she has proved the will and acted, I must consider her bound by the fact as stated in that recital. In consideration of the marriage and of the husband's estate, which was put into settlement, the residuum of the testator's personal estate to which Mary Riky was entitled, was settled upon her husband for life, then upon her for life, and after the death of both, upon the children of the marriage; and then there is a covenant by all the parties, that the said residuum should, within one year from the date of the marriage, be paid over to the trustees of the settlement. I cannot permit Mrs. Riky, filling the character both of the mother of the lady and the executrix, and stating that she is acting in the trusts of the will, which it was her duty to superintend, to say that she was not a party to this declaration; why did she join with the trustees? \*The executrix and trustees, to give effect to the settlement, make this declaration, that within a year the residuum shall be paid over. This was an obligation she imposed upon herself, and she ought to have seen it duly performed; she was bound to see the residuum duly got in, and transferred in the manner pointed out.

It was argued that there was no appropriation of the fund, and even if there had been, that it is not now desired to disappropriate it, but only to make it subject to Mrs. Riky's prior claim; for as there was nothing in the settlement to bind the widow, the parties took subject to her claim, and therefore, if the whole had been transferred to the trustees of the settlement, it would still continue liable to her demand. That is a plausible argument, and if the fund had been transferred in pursuance of

the covenant, those deriving under the settlement must have taken subject to her claim; but that case never arose, for although the widow entered into that declaration, she never performed the obligation of seeing the fund transferred. A sum of money was invested in the purchase of 4,200*l.* consols, and it is said that this was a breach of trust, the money not having been invested in the proper names. That point is not now open to argument, but the only question is, whether in point of fact there was an appropriation of that sum. I shall look only to the fact of appropriation, and disregard whether it was regularly made or not.

In 1798 this sum was invested in the names of Henry [\*127] \*Kemmis and Charles Haskins, the trustees of the settlement of 1797; this was a specific appropriation of so much of the testator's property as belonged to the clear residue, extra the charges; the widow acquiesced in this, by permitting the interest to be received by the husband under the settlement from that period down to 1828, when the bill was filed, and it is impossible for her now to call back a shilling of it. The other funds were differently circumstanced. In 1802 a sum of 2,000*l.* was paid to Thomas Kemmis, and no security was taken for it until 1808; but in Haskins' book a credit is given for it secured by a mortgage, dated the blank day of blank, from which I infer that there was an intention so to secure it. The will of A. Riky is recited in the conveyance to Haskins, and the mortgaged premises are conveyed to him upon the trusts declared in the settlement of 1797.- There can be no doubt that Haskins had a right to invest this sum upon mortgage, but it may be said that it is ambiguous whether it was made subject to Mrs. Riky's demand or not. The court has no means of knowing that except from the acts of the parties. From 1802 to 1827 that fund was allowed to remain in the hands of Thomas Kemmis without any demand being made by the widow. The fund was exclusively appropriated to the settlement of 1797. It appears that there was a clear fund of 13,000*l.* or 14,000*l.* in Haskins' hands at the time of the testator's death, and if Mrs. Riky had done her duty

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it would have been sufficient to satisfy every demand. The case as to the 610*l.* is more difficult; it was not affected to be advanced for the purposes of the settlement; \*no notice [\*128] was taken of it in the mortgage of 1808, though an intermediate transaction. In 1810 a security was taken for this 610*l.*, which was a mere common mortgage, without any reference to the trusts of the settlement of 1797. I must consider this sum to have been lent on this security, and that, up to 1810, there was no appropriation, but from that period I think there was; for although this sum did not in any other view belong to Mrs. Kemmis, yet Thomas Kemmis, on the production of his wife's receipts, was permitted to receive the whole of the rents. In effect there was an appropriation by that mode of dealing. The observation in the book by Haskins is applicable to all the three sums, and is strong evidence to show that they were appropriated to the uses of the settlement; it is a clear and explicit declaration, that there was an appropriation, and that Kemmis being at once bound to pay the interest and entitled to receive it no interest was due to him. So far as Haskins is concerned, it is not disputed that these sums were intended to be applied by him to the uses of the settlement, and that the rents and interest were received or retained by Kemmis.

The bankruptcy caused a new state of circumstances, which must have powerfully attracted the attention of Mrs. Riky and her advisers to the settlement of 1797. The evidence of Mr. Hogan shows, that in the first instance it was proposed that Kemmis should prove under the commission, and that afterwards it was settled that Mrs. Riky should prove, and that she took time to consider. I do not find that that evidence is consistent with the letter of the \*2d of May, 1813, from [\*129] William Kemmis to Charles Hogan. Another letter, dated the 24th of June, 1813, is still more at variance with the evidence of Hogan. The letter enclosing the account leads me to infer that Mrs. Riky herself was anxious to set up this claim under the commission. But in point of fact she did prove; her deposition to the account is made by her as acting executrix.



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I see nothing to induce me to say that she took this step at the instance of the Kemmis's as stated by Hogan; it was a proper step for her to take, as she was executrix. How can I allow her to say that she did not act as executrix, when I now find her coming forward as such on the only solemn occasion which called for her services? It is said, that the deposition does not refer to the book of accounts; but the account annexed to the deposition is signed by her, and in that account in the first item Haskins stands as debtor to the executors; she admits, therefore, when she signs it, that she, as executrix, was bound to look at that account. I am told that she is not to be bound by the entries in the book, which it is said she may not have seen, but her deposition refers to the account, and therefore, of necessity, to the book from which the account was extracted.

It was then said that the book was sealed up, but it had been previously open; it was her duty to examine it, and there is no evidence that she did not see it, and having made her deposition confirming an extract from the book, she is bound by everything in that book. After the final account the book was ac- [\*130] cessible, and from that period, at \*least she must be considered to have been aware of its contents. Under these circumstances I must consider her, in 1813, to have had full knowledge of the appropriation. If we look at the book itself we shall find some further evidence. There is an entry in it of the amount of property on the one hand, and of the obligations on the other; among the latter there is an entry of canal shares as of uncertain value; in 1813 this lady received these canal debentures in the character of executrix dealing with the assets, and appropriated them to her own use as legatee.

The only other fund was the dividend from Haskins' estate. By whom was that dividend received? By Mrs. Riky, who retained it as a fund belonging to herself; and she rests satisfied with the dividend as the amount of the fund to which she was entitled. Can it be now said that this acquiescence is to go for nothing? It is said that she paid the annuity of 30*l.* to Mrs.

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M'Nab, and that it was payable out of the general assets. This annuity was specifically charged on certain chattel interests, and is a continuing annuity, and as between the person entitled to the land and the person taking the general personal estate, the former takes *cum onere*. Where a portion is charged on a particular estate, I should be of opinion that the particular property was the primary fund. Supposing this to be so, then, although the annuity was a prior charge on the assets, yet the widow had a right to go against Kemmis, the tenant for life, for recovery of the sums paid on account of the annuity. But assuming that she had no such right, could she go against this fund?

\*The answer is, that this fund was already appropriated to the purposes of the settlement of 1797, in which it is described as belonging to the young lady; and I am of opinion that the evidence of appropriation goes to the whole fund. I find in the settlement of 1827 a recital to the effect, that there being four children, each is entitled to one fourth of this property, together with the accumulations from the death of their mother, which shows that this was considered as one entire fund. The widow has no right therefore against the funds which were made the subject of the settlements in 1797 and 1827. The circumstances of her allowing the rents to be received by the tenant for life up to the time of filing the bill, is conclusive against her right to follow the corpus of the estate. If there be a tenant for life bound to keep down an annuity, who is permitted by the person acting as executrix to receive the rents without performing the obligation, but she herself continues to pay the annuity, it is impossible to allow such an executrix afterwards to recover any portion of the past payments out of the general personal property which has been appropriated. As to the settlement of 1827, and the Master's report, I view both of them with surprise and regret; all parties were before the Master, with full means of knowing the facts, and it is hardly possible to suppose that the Master should have reported the fortune of the minors to have consisted simply of 4,200*l.* consols, without making any mention of the two existing mortgages, nor are they included in the settlement. The court, however, has power to correct the settle-

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ment of a ward after marriage; if from mistake or misconduct a \*portion of her property is not included in it, I should find no difficulty in bringing back the property into settlement. As the sums of 2,000*l.* and 610*l.* were regularly entered in Haskins' book, and as Mrs. Riky, the acting executrix, must have been led by her interest to inquire into the amount of the assets, it is singular, that in the settlement of 1827, there should have been a statement that the fortune of her granddaughter consisted only of her share of the sum of 4,200*l.* three per cent. consols, and I am not astonished at the observations made at the bar on this part of the case. I should feel it my duty to correct any impressions made by counsel, unjustly and wantonly observing on the character of any individual; but I must say, that a counsel would desert his duty, if he failed to make such observations on the conduct and characters of the parties as are pertinent to the facts of the case. I have no intention of saying anything which may reflect on the parties, but I cannot help remarking that there has been a great want of care and caution, and a withholding of information in this case; and I am bound to say that the court was deceived at the time of the last settlement, for if the court had been in possession then of what I know now, that settlement would have been differently shaped. Mrs. Riky executed the settlement as guardian of her granddaughter, and there is a recital of the amount of her fortune. The effect of the omission in the deed was to leave an equity in the widow which was the foundation of the bill of 1828; for as the settlement was silent as to the rights of the minor to the sums of 2,000*l.* and 610*l.*, it afforded [\*132] grounds for the claim of the widow in 1828. It \*is alleged that her bill was merely a defence; that is the best light in which I can consider it; she has clearly failed to support her claim. Overrule the exceptions and dismiss both bills with costs, the charges in Thomas Kemmis' bill not having been substantiated. [\*133]

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 Keating v. Keating.
 

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## KEATING v. KEATING.

1835: 27th January.

A lessee taking a reversionary lease from an executor, with full notice, is bound to show that such lease was properly granted by the executor in the due administration of his office.

A lessee, taking an unusual lease, is bound to see that the consideration is fully stated on the face of the instrument.

STEPHEN EGAN (the elder), being possessed of certain leasehold premises, by his will, made in the year 1790, bequeathed a certain denomination of land, called Killeagh, to his son Stephen (the younger), and a certain other piece of land, called Lisava, to his son Michael; and desired that the rent of the dwelling house in which he resided, with certain other rents should be applied to discharge the head rent payable for the said lands of Killeagh, and other lands in the neighborhood of Cahir. He then bequeathed the said dwelling house and other premises to his son James; and directed that if any of his children should die before they should have issue, the portion of the child so dying should go share and share alike among his other children. The testator then appointed his sons Michael and Stephen (the younger), and John Keating, his executors; but Michael alone proved the will.

In the year 1794, Michael and James Egan joined in making a lease of the dwelling house to one Thomas O'Brien, \*for thirty years from the date thereof, at the yearly rent [\*134] of 12*l.* 10*s.*, on the back of which Stephen (the younger) indorsed his consent. After this James Egan went abroad, where he died without issue, whereby (as it was admitted) Michael and Stephen became entitled, as tenants in common, to the interest of James in the said dwelling house, as the surviving children of the said testator. Stephen (the younger), some time after the death of his father, went abroad, but returned to Ireland in 1814. Thomas O'Brien the lessee, having died intestate, his widow made a division of the said dwelling house, and demised one half of it to M. Keating (the father of the plaintiff's

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late husband), for the residue of the term of thirty years, at the rent of 10*l.* 8*s.* Shortly before the expiration of the lease of 1794, the plaintiff, who after the death of her husband and father in law, entered into the occupation of the moiety of the said dwelling house, obtained a new lease thereof, dated the 14th of September, 1824, from Stephen (the younger), who for some time had been in receipt of the rents of the said house, for the term of twenty-one years, at the rent of 8*l.* . Another person of the name of M. Keating (the defendant), having got into possession of the other half of the house by an assignment from the widow of the said Thomas O'Brien (the original lessee), in the year 1809 and in the absence of Stephen (the younger), obtained from Michael Egan, the executor, a reversionary lease of the entire of the said house, to take effect on the expiration of the lease of 1794, at the rent of 12*l.* 13*s.* Michael Egan died in 1821, and Stephen (the younger) in 1829. In 1826, [\*135] the defendant, M. Keating, \*brought an ejectment to recover possession of the said dwelling house, relying on his legal title under the lease of 1809, and obtained a verdict.

The bill was filed in 1826, by Eleanor Keating, the lessee in the lease of the 14th of September, 1824, praying that the defendant, M. Keating, might be restrained from proceeding in the said ejectment, and from issuing any execution or writ of *habere* thereon.

Evidence was read on the part of the plaintiff, to prove, that in the latter end of 1823, and beginning of 1824, she had laid out a sum of 150*l.* in permanent improvements on the portion of the premises in her occupation, and also to prove that Stephen (the younger), was in receipt of the rents of that portion from 1815. On the part of the defendant, M. Keating, proof was made of the payment of a sum of 96*l.* 13*s.* 9*d.*, to Michael Egan (the executor), as a consideration or fine for the reversionary lease of 1809.

Mr. J. Scott and Mr. Geraghty, for the plaintiff.

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Mr. *Bennett*, Mr. *Moore* and Mr. *P. Walsh*, for the defendant.

The only question here is, whether the lease of 1809, which confers the legal title, is good also in equity; it was a perfectly fair transaction, it is proved that a large \*fine [\*136] was paid; and this house having been bequeathed for the purpose of keeping down the head rent of other premises, M. Egan, the executor; was perfectly warranted in making an under lease; it was his duty to make the most of the rents of the premises. The reversionary lease was made at the full value, and no fraud has been proved.

Mr. *Brewster*, for the defendant, John Egan, the personal representative of Michael Egan.

THE LORD CHANCELLOR:—Whatever may be the opinion of a court of equity respecting the lease of 1809, I am bound to take it for granted, from the recovery in ejectment, that that lease was a legal one. If I had to put a construction on the will of 1790, I should say, that the property, thereby bequeathed, went amongst all to whom any previous bequests were made, and, therefore, that Stephen and Michael Egan had an equitable interest in the property in dispute. I have no right to doubt the legal title of the executor. The question then is, are there any circumstances to take from the defendant the legal title? Many circumstances would justify an executor in equity in granting a lease instead of selling the premises, and I would sustain such a lease by an executor simply acting in a due administration of the assets, but such an act is not regularly within the province of an executor, and I must hold that it is incumbent on the persons taking a lease from executors to \*show, that the [\*137] act was for the benefit of the persons beneficially interested in the property. The lease of 1809 was a reversionary lease, not to commence in possession until 1824; all the persons interested acquiesced in the lease of 1794; one by being a party to it, and the other by a memorandum stating his concurrence: this is the best evidence that the family considered it a beneficial lease.

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Michael made the demise as the legal personal representative, and the property was part of the assets of the original testator, yet he was only a trustee for the original purposes of the will. Now the lease of 1809 was procured from one of the executors in the absence of the other, and it was a reversionary lease. It may be, I admit, a good legal, and perhaps a good equitable lease, if it can be shown to have been necessary, and for the benefit of the assets. But I cannot permit a person to hold a reversionary lease from an executor with full notice, without showing that such lease was properly granted by the executor in due administration of his office. The lessee of 1809 must have had notice of the lease of 1794, and of the claims of the persons in possession, and was bound by the nature of the title of the person from whom he took the lease. He should not have taken a lease without a reference to the persons beneficially interested. It is plain that the lease of 1809, when granted, was not a due execution of the authority of the executor; after so long a period it was not an act within the due province of an executor; and there was no necessity for a demise in order to fill up a vacant possession. The only ground alleged to sustain this act is, that the executor increased the assets

[\*138] \*by taking a fine. The evidence is, that he procured 96*l.*, but when I called for a copy of the lease, I found no mention made in it of any fine; so that if the taking of a fine could justify the grant of this lease as in effect a partial sale, that sum constituting such fine ought to have appeared as a payment made to the executor on the face of the lease, so as to give notice to the parties interested in the assets. If the lessee take an unusual lease he is at least bound to see that the consideration is fully stated on the face of the instrument, otherwise he enables the executor to commit a fraud by concealing the receipt of the fine. The executor, while the possession is full, after a lapse of near twenty years, grants a reversionary lease to commence at a very distant day, and receives a large sum to the prejudice perhaps of his *cestui que* trusts, as they cannot discover on the face of the lease that any consideration was paid for it. No doubt the lease must be sustained at law; but I have no hesitation in this

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case in setting it aside, without meaning at all to break down the power of an executor over the assets of his testator. It is clearly proved by the evidence that Stephen was in the receipt of the rents, and being so, he granted the lease of 1824; it is not for any party here to dispute his right; I must, under the true construction of the will, and by the acts of the parties, consider this portion as belonging to Stephen. The defendant, the representative of Michael, must therefore confirm the lease of 1824 to the plaintiff. Another point remains as to the costs. I do not approve of suits for so small an amount in value, where it is inevitable that the costs will be more than the value of \*the property. Money was laid out by the plaintiff in [\*139] improvements after notice from the defendant, but it is alleged that this was done in order to found a title upon the expenditure. As all the parties have been involved by the conduct of others I shall give no costs, but the costs of the ejectment lodged in court by the plaintiff on obtaining the injunction, should be paid out to her. That ejectment ought never to have been brought.

“Reg. Lib.—Decree the plaintiff well entitled to the possession of the dwelling house and premises in the pleadings mentioned, demised to her by the lease of the 14th day of September, 1824, for the residue of the term of twenty years and six months, at the yearly rent therein reserved, as against the defendants M. Keating and John Cusack, the executor of M. Keating, deceased, in the pleadings named. Let the injunction granted to the plaintiff be continued for quieting her in the possession of the said dwelling house and premises, and declare that the said house and premises so demised to the plaintiff, are part of and included in the share to which Stephen Egan, in the pleadings named, was entitled. Declare the plaintiff entitled to the sum of 41*l.* 6*s.* 7*d.* lodged in the Bank of Ireland to the credit of this cause, and let the Accountant-General of this court draw on said bank in favor of the plaintiff Eleanor Keating, or of her attorney thereto lawfully authorized, for the said sum of 41*l.* 6*s.* 7*d.* Let the plaintiff and the other parties in this cause abide their own costs.”



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[\*140] \*As to the liabilities of third persons dealing with an executor, where the act is not regularly within his province, see *Alford v. Drummond*, 14 Ves. 353, and *Lord Eldon's* judgment in 17 Ves. 153, where all the older authorities are reviewed. See also *Drohan v. Drohan*, 1 Ball & Bea. 185; *Downes v. Power*, 2 Ball & Bea. 491; *Keane v. Roberts*, 4 Mad. 332-337; *Watkins v. Cheek*, 2 Sim. & Stu. 205; *Cubbridge v. Boatwright*, 1 Russ. 549; *Wilson v. Moore*, 1 Mylne & Keen, 126; S. C. affirmed, *ibid*, 337.

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BERGIN v. WOODLOCK.

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1835: 27th January.

Testator gave to his daughter M. 1,000*l*., and the residue of his property to the child with whom his wife was then pregnant; and in case said child should not be born alive, or not arrive at the age of maturity, he directed the property allotted to her to be given to his daughter M.; and in case M. should die before marriage, then her portion to the child with whom his wife was pregnant; and in case they both died *without arriving at the age of maturity, then over to third persons*. The posthumous child was born alive, and M., who survived, died before sixteen, and both unmarried. Held—that in this case maturity meant marriage, and that the gift over took effect.

J. WOODLOCK by his will gave to his daughter Margaret the sum of 1,000*l*., and he also gave to the child with whom his wife was then pregnant, the residue of his property, real and personal; and in case the said child should not come to this world alive, or should not arrive at the age of maturity, he directed the property allotted to her to be given to his daughter Margaret; and if his said daughter Margaret should leave this world before marriage, he then bequeathed her portion to the child with whom his wife was then pregnant; and in case they should both die without arriving at the age of maturity, he directed that 500*l*. of the property before bequeathed to his children should go to his wife, and the remainder among his brothers and sisters

[\*141] equally. He then desired that \*his executors should put the property of his children into the hands of some respectable person at interest, the interest to be laid out upon their education, and the residue to be reserved until they should arrive at age. He further desired that neither of his children

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should marry without the consent of his wife and executors, and in case either of them should do so, then that the portion of the offender should be given to the other, reserving to the executors the power of giving to the offender that portion of the property which they might deem proper.

The posthumous child was born alive and lived one year, having died in the lifetime of Margaret, who lived to the age of sixteen only, having previously made her will.

The bill was filed by the executor of Margaret, to carry the trusts of J. Woodlock's will into effect.

Mr. Ball, Mr. Woulfe, and Mr. Hudson for the plaintiff.

The unqualified gift of 1,000*l.* to Margaret, in the first part of the will, if not defeated by the contingencies subsequently specified, now belongs to her personal representative. The testator directs (in case of Margaret's decease before marriage), that her portion should go to the posthumous child, but as the latter died in the lifetime of Margaret, the contingency has not literally happened, and therefore her legacy has not been divested. Besides the share of the posthumous child, in case it should \*not arrive at maturity, is in another part of the will left [\*142] to Margaret, so that Margaret's legacy has reverted to her, and in either view it belongs to the plaintiff. As to the limitation over to third persons, in case both the testator's children should die before they arrived at the age of maturity, that has not taken effect, as Margaret lived to the age of sixteen, and there is authority for saying that females arrive at maturity at twelve; moreover this limitation is rendered nugatory by the last clause in the will, which directs, that in case either child should marry without consent, her share should go to the other; this is totally inconsistent with the previous bequest over, and the last clause in a will must prevail. Where the event on which a legacy is given over, is not so described as to satisfy the court of the intention of the testator, the bequest over will be defeated.

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Mr. *Richards* for the personal representative of the posthumous child.

THE LORD CHANCELLOR:—The testator gave to Margaret Woodlock 1,000*l.*, that is a simple bequest, and the residue of his property, real and personal, to the child with whom his wife was then pregnant, and in case that child should not be born alive, or not arrive at the age of maturity, he then directed that the property intended for it should go to Margaret. In the abstract, what does the age of maturity mean? maturity may mean either twenty-one or marriage, but in this case, I think [148] \*it must mean marriage: generally speaking, if a word have a proper sense, and the testator use it in its proper sense, it cannot in the same will be read in any other; because he has shown that he knows how to use the term, and it requires a strong case to enable the court to give two different meanings to the same word in the same instrument; however, in this case I think marriage and maturity mean the same thing, for, in a subsequent clause of the will, the testator provides that in case his daughter Margaret should die unmarried, her share should go to the posthumous child, and in case they should both die without arriving at the age of maturity, he then wills his entire property over to third persons; he thus tells us that by maturity he means marriage. Mr. *Hudson* argues that the last clause in a will must prevail, if it be inconsistent with the former; that is a fair rule of construction if it actually does override and defeat the former limitations. It has been said there is no magic in words, and I say there is no magic in the particular position of a clause in a will: and the court must endeavor, if possible, to give effect to the whole intent, and dovetail the sentences into each other. The testator then provides that if either of his children should marry without the consent of his executors, the portion of the offender should go to the other, and thus puts a check upon a premature marriage.

Mr. *Ball* has argued that the absolute gift to Margaret in the first part of the will is not defeated by the subsequent limi-

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tations, as the posthumous child died in the \*lifetime [\*144] of Margaret, and, therefore, the express contingency did not literally happen, relying upon the doctrine laid down in *Smither v. Willock* (a) and *Harrison v. Foreman*, (b) and that class of cases. (c) In the latter case, there was a bequest to A. and afterwards to B. and C. in equal shares, and in case either died in the lifetime of A., the whole to the survivor living at her decease; the court there held, that the gift over was a substitution, and as both died in the lifetime of A., the express contingency not having happened, their interest was not divested. That does not apply to this case, for here the testator directs that if either of his children should die without being married, the share of that child should go to the other, and if they both died without being married, then the whole should go over to third persons. Both these contingencies have happened, and the gift over has, I think, taken place.

## \*ALEXANDER v. CROSBIE.

[\*145]

1835: 28th January.

A marriage settlement recited an agreement to convey a certain estate, save and except the lands of Ballyhenry and its subdenominations, but the operative part of the deed purported to convey by name, as a separate denomination, the lands of Killahan, which it was proved, were reputed a subdenomination of Ballyhenry. Held—that there was not sufficient evidence of mistake to justify the court in striking Killahan out of the settlement.

*Semble*, the court will reform a settlement where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach.

By articles of agreement, bearing date the 9th of December, 1745, it was covenanted to settle certain lands, described as “all that and those the lands of Ballynoe, Clonderries, &c., Bally-

(a) 9 Ves. 233.

(b) 5 Ves. 207.

(c) See *Skay v. Barnes*, 3 Mer. 335; *Browne v. Kenyon*, 3 Mad. 410; *Sturges v. Pearson*, 4 Mad. 411; *Whitell v. Dudin*, 2 Jac. & W. 279; *Bromhead v. Hunt*, 2 Jac. & W. 459.

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henry, and Killahan." And by a deed of 1788, the said lands, under the same description of "Ballynoe, Clonderries, Ballyhenry, Killahan," together with other denominations, were conveyed upon certain trusts which it is not necessary to particularize. James Crosbie afterwards became entitled to an estate for life in these several lands, with remainder to his son Pierce in tail, and an ultimate remainder to himself in fee. And by an indenture, bearing date the 10th of January, 1815, and made between the said James Crosbie of the first part, the said Pierce Crosbie of the second part, John Mitchell, and Elizabeth his daughter, of the third part, and trustees of the fourth part, after reciting that a marriage was intended to be had between the said Pierce Crosbie and said Elizabeth Mitchell, and that it had been agreed upon that all and singular the estates, towns, lands, &c., of them the said James Crosbie, and Pierce his son, situate in the county of Kerry, of every denomination, save and except the town and lands of Ballymalis, and the townland of Ballyhenry, and their subdenominations, should be settled and assured upon certain trusts, they the said James and Pierce Crosbie conveyed to trustees and their heirs, all that and those the [\*146] towns and lands of Ballynoe, \*Clonderries, Killahan, &c., with their and each of their rights, members and appurtenances, to hold the same upon trust, to permit Pierce Crosbie and his intended wife to receive certain annuities, and subject thereto to the use of said James Crosbie for life, remainder to Pierce for life, with remainder to the first and other sons of the said marriage, in tail male, &c. And by the said deed, the said James and Pierce Crosbie then conveyed unto the same trustees and their heirs, all that and those, the two townlands called the two Ballymalises, and the town and lands of Ballyhenry, to hold the same, with their appurtenances, to and for the use and benefit of the said James Crosbie, his heirs and assigns forever.

By a deed, dated the 19th July, 1819 (reciting the deeds of 1745 and 1788, and the last-mentioned settlement of 1815), in consideration of two several sums of 3,500*l.* and 4,000*l.*, the said

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James Crosbie conveyed to Messrs. Fry and Chapman, their heirs and assigns forever, all that and those, the towns and lands of Ballyhenry (therein mentioned as known by the surnames of Toneaknuck, Kilbraccan, and Killahan, or by whatever other names or denominations the same were known), upon trust to sell the same, and pay themselves out of the produce of the sale, the sum of 7,500*l.* with interest, and stand possessed of the surplus in trust for the said James Crosbie, his executors, &c., and to convey such part as should not be sold, to the said James Crosbie, his heirs and assigns.

\*In 1825, the Messrs. Fry and Chapman filed their [\*147] original bill, setting forth the several deeds before mentioned; and having been declared bankrupts in 1828, a supplemental bill was filed by the present plaintiffs, their assignees, in which they charged that Killahan was a subdenomination of Ballyhenry; that at the time of the execution of the said settlement, it was the intention of the parties that the entire townland of Ballyhenry should be conveyed to the use of James Crosbie in fee, to enable him to discharge all the debts and incumbrances affecting his estates; and that Killahan was unintentionally and by mistake conveyed to the said trustees upon the other trusts of said settlement; and prayed, amongst other things, that the deed of the 10th of January, 1815, might be reformed and altered according to the true intention and agreements of the parties thereto, by striking out from amongst the several settled lands, thereby conveyed in strict settlement, said subdenomination of Killahan, and that same might be declared to be liable to the trusts of the said deed of 19th July, 1819.

The plaintiffs examined several witnesses, who proved that Killahan was reputed and considered as a subdenomination, and part of Ballyhenry.

Mr. *Farrell*, and Mr. *Hickson*, for the plaintiffs.

The only question is, whether the insertion of Killahan, in the operative part of the deed, was in pursuance, or in violation of

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the deliberate and clear intention of the parties expressed \*in the recited agreement. It was the intention to except Ballyhenry and its subdenomination, and it has been clearly proved that Killahan was always considered as a subdenomination of Ballyhenry. This is not an attempt to vary a settlement by mere parol evidence, inasmuch as the recital in the deed affords sufficient evidence of the intention to exclude Killahan from the lands then about to be settled, and must control that part of the deed by which it is conveyed through accident or mistake, *Beaumont v. Bramley*.(a)

Mr. Warren, Mr. Ardill, and Mr. Fitzgerald, *contra*.

The plaintiffs having failed to show that Killahan was conveyed contrary to the intention of the parties; there is no evidence of instructions for preparing the deed of 1815; nothing to show the concurrent intent of all the parties; *Townshend v. Stangroom*;(b) or that Killahan was considered as a subdenomination by the friends of the young lady, who, on the contrary, may have had the value of it in their contemplation at the time of the settlement; and no compensation could be now made to her or her children if this denomination be struck out; *M'Alpine v. Swift*(c) The deeds of 1745 and 1788, in which Ballyhenry and Killahan are treated as distinct denominations, are stated in the bill, and recited in the deed of 1819 under which the plaintiffs claim.

[\*149] \*Mr. Litton in reply.

It was the habit of conveyancers in Ireland to recite for security sake the several names by which a townland and its subdenominations were called, so that no inference can be drawn from the circumstance of these names being placed in juxtaposition in an old deed.

THE LORD CHANCELLOR:—Although I had not the slightest doubt on this question, I thought it right to hear the arguments

(a) Tur. & Russ. 41.

(c) 1 Ball & Bea. 285.

(b) 6 Ves. 328.

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of all the counsel. As to the authority of a court of equity to reform a settlement, nobody can dispute its power to correct a mistake ;(a) and it is not material that the settlement was made and the property actually conveyed by it for valuable consideration, for if any part of the property was included by mistake, this court may take it out of settlement without compensation. But a court of equity is always tender in varying a settlement, where the effect will be to defeat vested rights, or where it is sought to do so \*on mere parol evidence. In all [\*150] the cases, perhaps, in which the court has reformed a settlement, there has been something beyond the parol evidence; such, for instance, as the instructions for preparing the conveyance or a note by the attorney, and the mistake properly accounted for ;(b) but the court would, I think, act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach. But, in the present case, the parol evidence is adduced, not to show a mistake, but to lay a foundation for showing that there may have been a mistake. The evidence goes to establish the fact, that Killahan was considered a subdenomination of Ballyhenry, and I must take that as a fact established. No attempt has been made to prove the contrary: this then leaves the case open to the weight to be given to that fact. The question

(a) See *Uvedale v. Halfpenny*, 2 P. Wms. 151; *Mottaux v. London Assurance Company*, 1 Atk. 545; *Henkle v. Royal Exchange Assurance Office*, 1 Ves. Sen. 317; *Baker v. Paine*, Ibid. 456; *Taylor v. Radd*, cited in 5 Ves. 595; *Countess of Shelbourne v. Inchiquin*, 1 B. C. C. 338; *Higginson v. Kelly*, 1 Ball & Bea. 252; *Ex parte Verner*, Ibid. 260; *Ball v. Storie*, 1 Sim. & Stu. 210. And as to mistakes in bonds, see *Simpson v. Vaughan*, 2 Atk. 32; *Bishop v. Church*, 2 Ves. Sen. 106; *Thomas v. Fraser*, 3 Ves. 399; *Burn v. Burn*, Ibid. 573; 9 Ves. 125; 10 Ves. 227; 19 Ves. 475.

(b) *Young v. Young*, cited in 1 Dick. 295; *Rogers v. Earl*, 1 Dick. 294; *Thomas v. Davis*, 1 Dick. 301; *Jenkins v. Quinchani*, cited in 5 Ves. 596; n. S. C. Ambler, 147; *Barstow v. Kilvington*, 5 Ves. 593. See also *Coldcot v. Hill*, 1 Cha. Ca. 15, S. C. 2 Freem. 173; *Fielder v. Studley*, Finch, 90; but in *Harwood v. Wallis*, cited in 2 Ves. Sen. 195, the court refused to admit parol evidence, there being nothing in writing under the hands of the parties to show their intention; and see the observations upon these cases by Sir E. Sugden, in the *Treatise upon Vendors and Purchasers*, vol. i. 160, *et seq.* 9th ed.



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for me now to decide is, whether, on the face of the settlement of 1815, there is sufficient, with the knowledge of this fact, to enable me to strike that denomination out of the settlement. The recital in the commencement is in these

[\*151] \*terms : (a) "and whereas it has been agreed that all and singular the estates, towns, lands, &c., of them the said James Crosbie and Pierce Crosbie, situate in the county of Kerry, of every denomination, save and except the town and lands of Ballymalis, and the townland of Ballyhenry, and their subdenominations, shall be settled and assured," &c. Nothing can be more express, I admit. The manner in which this intention is carried into execution is this; in consideration of the fortune of the lady, and of the said intended marriage, the father and the son do not convey all the estates by a general description, but take upon themselves to describe the several estates; it is not a general conveyance of all the estates, "save and except Ballymalis and Ballyhenry," but a conveyance of the several denominations by name, including Killahan. The question then is, was Killahan inserted among the others by mistake? I have here to deal with the case of a conveyance, not by a general description, but where the parties give a description of the exact portions they intend to convey; I find Killahan in the midst of others which are conveyed, and I see no reason to suppose that it was not intended to be conveyed; on the contrary, I must suppose that such was the intention, for in a subsequent part of the deed, I find the parties describing the excepted portion in the terms, "all that and those the two Bally-  
[\*152] malises and Ballyhenry, with their \*appurtenances."

It is singular that in this part of the deed there is not a word said of the subdenominations. Though I admit the head denomination will carry the subdenomination, yet that point cannot arise where the particular denomination is excluded. There is enough on the face of the deed to satisfy me that the parties intended to convey Killahan. The difficulty is the same as in the case cited from Turner and Russell, and the evidence

(a) As to the effect of recitals, see *Moore v. Magrath*, Cowp. 9; *Doran v. Ross*, 1 Ves. Jun. 57; *Payne v. Collier*, 1 Ves. Jun. 170; *Bailey v. Lloyd*, 5 Russ. 344.

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does not clear away that difficulty. I must sacrifice either the first or the second part of the deed; if there are two parts of a deed inconsistent with each other, I must sacrifice one, but can I have any doubt in sacrificing the general description in the first part in favor of that in the latter part, in which there is a clear, defined, and expressed intention? I must not lose sight of this, that the Crosbies were dealing with the friends of the intended wife, and who was so likely to know the proper description of the premises as James Crosbie? If James Crosbie conveyed the estates for the lady and her issue by name, he cannot afterwards expect to cut down the conveyance so expressly made, in order to increase his own portion. There is no evidence to show that the relations of the lady, or the lady herself, did not take into consideration the value of Killahan. If there has been a mistake I regret that it has occurred, but it is impossible to sacrifice the rights of the widow and of the issue in favor of a person who could protect himself, and who knew the particular denominations of the estate, and who introduced the exception.

\*The persons claiming against the issue under the [\*153] subsequent conveyance are entitled to little consideration, although if they have rights the court will give them their rights. Their own bill states the deeds of 1745 and 1788, in which latter Killahan is conveyed as a separate denomination. I admit it is put in juxtaposition with Ballyhenry, but still this was sufficient to have put the creditors on inquiry. In the deed of 1819 there is a recital of the deed of 1745, in which I find Killahan stated, though I do not find Ballymalis: if the parties themselves have from time to time treated Killahan as a separate denomination, where they intended it to pass by its own proper name, how can I say that it was included by mistake in the conveyance by its own name, when it was not named among the excepted denominations? The claim, therefore, made by the creditors under the deed of 1819, is altogether without foundation. I shall dismiss so much of their bill with costs, as seeks to reform the settlement.

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[\*154]

\*LAWLESS v. SHAW.(a)

1835: 30th January.

A. S. being seised in fee of certain lands, devised the same to W. S. for life, with remainders over, and expressed it to be his particular desire, that his executors, whilst acting in the management of his affairs, and W. S., when he should enter into the receipt and management of the rents, should continue B. E. L. in the receipt and management thereof, and should likewise employ and retain him in the receipt agency, and management of the rents of such other lands as should be purchased in pursuance of the directions of his will, at the usual fees allowed to agents. Held—a trust for B. E. L., and that the devisees were bound to retain him as agent at the usual fees.

If a property be given by will absolutely and without restriction, the court will not lightly impose upon it a trust upon mere words of recommendation or confidence. An agent, imposed by will upon the devisee of an estate, may be removed by this court if he conduct himself improperly.

W. A. SHAW, being seised of estates in fee simple, and also possessed of considerable personal property, by his will, dated the 17th August, 1829, devised his real estates, charged with certain annuities, to trustees to the use of, his friend, William Shaw (then aged about twenty years) for life, without impeachment of waste, with remainder to his first and other sons in tail male, and in default of such issue to the use of W. J. Alexander for life, remainder to W. Alexander, his eldest son, for life, remainder to his first and other sons in tail male, with divers remainders over. And the testator directed that the said W. J. Alexander and W. Alexander, and their respective male issue, when they should respectively come into possession of the said estates, should take the name and use the arms of Shaw; and in case of their refusal or neglect so to do, then, that the estate should go to the person next in remainder.

As to the residue of his personal estate, he directed his trustees, after payment of his debts, legacies and funeral expenses, to invest the same in the purchase of lands in fee simple or per-

(a) Reversed, 1 Dru. &amp; Walsh, 512.

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petual inheritance, and stand seised thereof upon the same uses as were expressed concerning his other estates; with a proviso that such purchase should, during the minority of his friend William Shaw, be made with the approbation of one of the Masters of \*Chancery, upon a reference to be made [\*155] to him in a cause to be instituted for that purpose; but after said William Shaw should attain his majority, then that the interference of a court of equity should be unnecessary, and that such purchase should thenceforward be made by his trustees, with the consent in writing of his friend William Shaw.

The testator then directed that his executors should apply the annual sum of 300*l.* in the maintenance and education of the said William Shaw, until he should attain the age of twenty-one; and bequeathed to the plaintiff the sum of 100*l.* in the following words: "I also give and bequeath unto my friend and agent, B. E. Lawless of Harcourt street, in the county of Dublin, the sum of 100*l.*, as a token of my esteem for him." He then bequeathed to the industrious poor on his estates of Kentstown, Veldanstown, and Knockirk, in the county of Meath, the sum of 150*l.*, which sum he directed should be paid by his executors to his agent, the said B. E. Lawless, to be by him distributed amongst them in such manner, shares and proportions, and to such objects of charity, residing thereon, as well as in the neighborhood thereof, as he should deem most advisable and deserving of pecuniary aid."

Immediately after the above clause there followed this passage, upon which the question in the cause arose: "And it is also my particular desire, that my said executors, whilst acting in the management of all or any of my affairs under this my will, as also my friend \*William Shaw, when he shall [\*156] enter into the receipt and perception of my said rents of Kentstown, Veldanstown and Knockirk, shall continue the said B. E. Lawless in the receipt and management thereof, and likewise shall employ and retain him in the receipt, agency and

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management of the rents and issues of such other lands and premises as shall and may be purchased and settled in pursuance of the directions hereinbefore contained, at the usual fees allowed to agents, he having acted for me, since I became possessed of said estate, fully to my satisfaction."

And the testator further bequeathed a sum of 150*l.* to the plaintiff, whom he described "*as his friend and agent,*" to purchase and erect a monumental tablet, containing inscribed thereon the names of the several members of his family who had been interred in his burial ground of Kentstown.

In the month of October, 1829, the testator died, leaving a large personal property, a portion of which was invested by the trustees in the purchase of an estate called Cruisetown, pursuant to the directions in the will. In the month of December the defendant William Shaw attained his majority, and in the summer following, upon the completion of the purchase of the Cruisetown estate, he informed the plaintiff, B. E. Lawless, who, up to that period, had continued to act as land agent, that it was not his intention to employ him any longer as such, and that he had appointed another person in his place.

[\*157] \*The plaintiff thereupon filed his bill in September, 1831, praying that he might be declared entitled, according to the true construction of the will, to be continued in the receipt of the rents of the devised estates, and to be employed in the receipt of the rents of the estate purchased pursuant to the trusts of the will, at the usual fees paid to agents, as also of any other estates to be thereafter purchased, with any part of the residue of the said personal property, offering to act as land agent and to discharge all the duties thereof; and that the defendant might elect either to permit him so to act, and in such event that he might be declared entitled to receive yearly one shilling in the pound on the rental of the said estates as agent's fees, or to make compensation to him for the value of the said agency; and that the amount of such agency fees or compensation might be

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declared a charge upon the rents and profits of the said estates, and that the defendant might be declared to be a trustee for him the said plaintiff, as to so much of the rents of the said estates as should be required to keep down the amount of such agency fees or compensation.

The defendant in his answer insisted that, according to the true construction of the will, it was not imperative on him to employ the plaintiff as his agent, and he also impeached his character and capacity; but the latter part of the case was subsequently abandoned at the hearing, and the defendant relied solely upon the construction of the will.

\*The cause was heard on the 29th of May, 1833, [\*158] before Lord Plunket, who dismissed the bill with costs, except those costs which had been occasioned by the imputations cast upon the plaintiff's character, as to which each party was decreed to abide his own costs. The cause now came on to be reheard at the instance of the plaintiff.

Mr. *Richards* and Mr. *Ball*, for the plaintiff.

It is well established that words of request, desire, or recommendation in a will are to be construed as imperative, and as creating a trust, provided the subject matter and the objects are sufficiently certain or capable of being ascertained; it must be admitted that the words in this case are sufficiently imperative—they are of the strongest character. The only question then is, whether the subject matter and the object are sufficiently certain; now the office itself and the subject on which the devise is to operate, viz., the life estate of the defendant, are sufficiently certain, and the object is pointed out by name. We rely upon the authority of *Hibbert v. Hibbert*,<sup>(a)</sup> and *Tibbits v. Tibbits*.<sup>(b)</sup> Every objection, applicable to the principal case, applies equally to that of *Tibbits v. Tibbits*, and the inconvenience there was quite as great as in the case before the court; it is as annoying to a land-

(a) 3 Mer. 681.

(b) 19 Ves. 656; S. C. Jac. 317.

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lord to be obliged to continue a tenant who may be refractory, as to Mr. Shaw to be compelled to employ the plaintiff as his agent. The testator, by prescribing the terms on which [\*159] \*the plaintiff was to be continued agent, namely, the payment of the usual fees, has shown clearly that he intended to benefit him. The estate is devised in strict settlement, and may it not, therefore, have been in the contemplation of the testator to secure, for the benefit of the estate itself, and those in remainder, the services of Mr. Lawless, whom he himself had found an active and faithful agent?

The *Attorney-General*, Mr. *Lefroy*, Mr. *Warren* and the Hon. Mr. *P. Plunket*, for the defendant.

The general rule, we admit, is, that words of desire in a will may amount to a trust, provided the subject and the object are certain. As to the person there is no difficulty, for he is ascertained; but the question is, whether the subject of the bequest, namely, the agency of the estate, is a matter sufficiently defined and certain. Did the testator mean an agency of a different character and description from that which the plaintiff held under himself? there is no ground to contend that he did. What is understood by the term agent? a person employed at the will and pleasure of another, to manage and receive the rents of an estate; substituting this definition for the term in the will, the bequest, then, is of an office revocable at the will and pleasure of the defendant. If the testator meant to employ the term agent differently from its ordinary signification, as importing an irrevocable authority, why did he not say so? where he intends to be imperative, as in the clause directing the assumption of [\*160] his name \*and arms, and also in the paragraph containing the bequest to the industrious poor, he uses words clearly mandatory, as "I direct," &c.; but where he gives the devisee a discretion, as in the clause under discussion, he uses different language, as "I desire," &c. Suppose the words of the testator were, I desire that you employ Mr. Lawless as your law agent, or if he had been a baker or tailor, that you buy your

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clothes or purchase your bread from him, would that raise a trust which this court could be called upon to execute? The object of such a recommendation could not be intended for the benefit of the plaintiff but the devisee. If this office is to be held a charge on the estate, it must follow the lands into whatever hands they pass, and restrict the power of alienation. The construction contended for would be highly inconvenient to the defendant, and attended with injurious consequences. The cases cited are distinguishable from this; *Tibbitts v. Tibbitts* was a devise of lands or rents, and not a bequest of a personal office, and there was a total absence in it of all ambiguity; in *Hibbert v. Hibbert* the devisees were infants, and the testator took upon himself to nominate a person to be the receiver under the Court of Chancery, and expressed an intention of benefiting him in a pecuniary point of view.

Mr. *M'Kenna* in reply.

With regard to the objection made to the construction contended for by the plaintiff, namely, that it would have the effect of incumbering the estate so as to \*interfere [\*161] with the power of alienation, that might have been urged with equal force in the case of *Foley v. Parry*,<sup>(a)</sup> where the devisee for life was directed to superintend the education of the testator's grandnephew, so as to fit him for any respectable profession; and it was held that the expense should be borne by the life estate. As to the cases put of a direction to employ a particular baker or tailor, the court would execute even that trust, if the direction went a little further, and required that the person specified should be paid out of the rents of the devised estate. The clause in question is connected by the copulative "also" with the preceding clause, in which the directions are confessedly imperative.

4th February.—THE LORD CHANCELLOR:—The point for me to decide in this case is, whether the direction in the will, that

(a) 5 Sim 128; affirmed upon appeal, 2 Mylne & Keen, 128.



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Mr. Lawless should be retained as agent over the estate of the defendant, is or is not imperative and binding on the tenant for life taking under the will? The testator charges his estates with the payment of certain annuities, and directs a sum of 300*l.* a year to be paid for the maintenance of his friend Mr. Shaw (who it seems is not the person who would otherwise have succeeded to the estates). The testator treats him as a minor, and as he would be for some time under disability, he provides a maintenance for him until he should attain his majority; and in the mean time the estates are left in the hands of the trustees [\*162] during the minority. It must be admitted that the testator, when he intended it, makes a distinction between the authority given to the trustees during the minority and that which they are to exercise after Mr. Shaw should attain twenty-one; for example, the purchases by the trustees, during the minority, are to be with the approbation of a Master of this court, but when he attains his majority they are to be made with his consent in writing; he therefore draws a marked distinction between the authority which the trustees are to have before and after the tenant for life attains twenty-one. It is said that Mr. Lawless drew the will, and therefore it is argued, if any doubt should arise upon it, it ought to be given against him. Some evidence indeed was offered to prove that he prepared the will, but it was objected to, as this point was not put in issue by the answer. I therefore rejected that evidence, and I must now take it as a will to be construed without any reference to the personal character of Lawless.

The testator in a former part of the will gives Mr. Lawless, whom he described as his friend and agent, a legacy of 100*l.*, as a token of his esteem for him; and he also reposes a certain confidence in him in the clause preceding the one in question: "I also give to the industrious poor on my estates 150*l.*, to be paid by my executors to my agent, the said B. E. Lawless, to be by him distributed amongst them in such manner, &c., as he shall deem most advisable." This further direction follows the clause on which the present question has arisen: "I also give

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unto my friend and agent B. E. Lawless, 150*l.*, that he \*may be enabled to erect a monumental tablet, &c.;" [\*163] so that Lawless was evidently a person in whom he reposed confidence. First he gives him a personal legacy of 100*l.*, and then gives 150*l.*, which he directs to be paid to him, to exercise his discretion in the distribution of it: and, lastly, confides to him the erection of a monumental tablet. The question then is, whether or not it is imperative on Mr. Shaw to employ Lawless as his agent? On the abstract point of law I have no difficulty; the words are quite sufficient to raise a trust, if you can collect the intention from the entire will of the testator, and can show that the person is certain, the subject certain, and the amount to be paid certain. I can see nothing uncertain in the direction that the usual fees shall be paid to the agent, and if there were any question on that point, it might easily be ascertained in the Master's office what the usual fees are. Since the late authorities it is difficult to raise a trust upon words of recommendation when the property is vested, in words, absolutely and beneficially in the devisee. In the case of *Heneage v. Andover*,<sup>(a)</sup> affirmed on appeal in the Lords, the court held that no trust was created, mainly upon the strong expression in the actual gift to the devisee. *Wright v. Atkyns*,<sup>(b)</sup> affords another instance in which the rule has been confined. There was a devise and bequest of real and personal property to the wife of the testator and \*her heirs, "in the fullest confidence," that after her decease she would devise the property to the family of the devisor; on this devise it was held that she was not entitled to cut the timber on the estate as being a mere tenant for life. At the time, that was not thought a sound decision, and there was, after a long interval, an appeal from it to the Lords, to this extent, the devisee insisted she had a right to all the incidents in point of enjoyment belonging to an estate in fee simple during her life, and therefore a right to cut timber. The question was not quite decided on the first appeal, and the case came on again before Lord Eldon, but on a second appeal

(a) 10 Price, 230; S. C. under the name of *Meredith v. Heneage*, 1 Sim. 542.

(b) 19 Ves. 299.

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in the same session that noble Lord gave way, and the House of Lords decided that the devisee had a right to cut timber as if she were owner of the fee, and she did so to the extent in value of many thousand pounds. These decisions, I admit, show that if the property is given absolutely, and without restriction, you cannot lightly impose upon it a trust upon mere words of recommendation or confidence.

I have arrived at my present conclusions with hesitation, and with the utmost deference to the opinion of my learned predecessor,<sup>(a)</sup> who appears to me to have considered this as [\*165] \*a question of convenience or inconvenience, and to have held, that as the clause admitted of two constructions,

(a) The following is the note of Lord *Phuket's* judgment in this case, which was furnished to the court in the course of the argument, and with which the editors have been favored.

1833: 29th May.—THE LORD CHANCELLOR:—Two principles have been relied upon at needless length on the part of the plaintiff, inasmuch as both are indisputable, viz., first, that words of desire, request or recommendation in a will, are in many cases to be held as creating a trust; and secondly, that if a testator create a trust or make a bequest by clear and adequate expressions, the court is bound to give effect to it, no matter how unreasonable it may appear, or with what inconvenience to any party it may be attended. But inasmuch as the construction of a will must depend upon the testator's intention, to be collected from the terms used, where the court finds terms used of an ambiguous import, capable of two constructions, and that one of such constructions is plain, obvious, reasonable and free from difficulty; the other forced, unnatural, unreasonable, inconvenient and contrary to the ordinary customs of men, it will justly resort to the argument as to the reasonableness and convenience of the disposition, or the contrary, for the purpose of inferring that the testator could not have intended a construction to be put upon the expressions used by him which would involve such consequences. Here there can be no doubt that the appointment of an agent irrevocably fixed upon the estate, free from all control by the person to whom the enjoyment of the estate is given, is contrary to our common experience, and there can be no doubt, therefore, that when the testator expressed his "desire" that the plaintiff should be continued as agent over the estate after his death, he meant he should be continued on the same footing as he was employed by himself; that is to say, subject to be removed at pleasure, whenever the party should think fit either to substitute another person in his place, or to act as his own land agent if he thought proper to do so. Such a right, as that claimed here, would be attended with monstrous inconvenience to the owner of the estate, and, therefore, unless there

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one of which led to inconvenience and the other not, he \*was bound to take that which led to no inconvenience. [\*166] No opinion could have been more strongly marked, as Lawless was made to pay the costs of the suit, except so much as was occasioned by the impeachment of his character. I confess I should have thought that as the difficulty was raised by the testator himself, and as Lawless had a right to come here to have the construction of the court upon the will, he should not have been decreed to pay the costs, and certainly where the will admitted of two constructions, and the testator has himself raised the doubt, he should not have been compelled to pay for clearing up that doubt. I mention this only for the purpose of showing the strong opinion expressed by Lord Plunket.

Now in considering this case I have to answer this question, was it on the whole of the will the intention of the testator to give a benefit to Lawless or not? I am of opinion it was. After giving 150*l.* to the poor, the testator proceeds in these words: "It is also my particular \*desire, &c." I have [\*167] given him 100*l.* as my agent and friend; and as he acted as my agent during my life faithfully and honestly, it is my particular desire that he be continued receiver and retained as agent to my trustees. Is that a simple recommendation to continue him in an office removable at pleasure, and which the devisee may put an end to the next hour? or is it a direction to continue him against the will of the devisee, subject of course to the conditions implied, that he conduct himself honestly and faithfully

are necessary words coercing the court to do so, it cannot hold the conferring of such a right to have been in the testator's contemplation. For these reasons the bill must be dismissed; and an attempt of this kind on the part of the plaintiff, to force himself upon the defendant against his consent, upon a very forced construction of the will, is entitled to no great favor in a court of equity. The bill must, therefore, be dismissed with costs. But as a very considerable part of the costs of the cause have been occasioned by the impeachment of the plaintiff's character, relied on in the defendant's answer as a ground of defence, when, in fact, the question of construction, on which the defendant has ultimately rested his case, might have been decided upon demurrer; as to such portion of the costs as have been so occasioned, let each party abide his own costs.

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in the discharge of his duty, and continue competent both in mind and body? Does it mean that the agency should be of the same character, and that he was to be continued in the same manner as he was employed by the testator himself, that is, removable at pleasure?

I have been very much impressed with one circumstance to which I believe the attention of Lord Plunket was not drawn, and I cannot say what weight it might have had on his mind; it certainly had considerable weight with me. The estates were vested in trustees until Shaw came of age, and if he died under twenty-one, leaving issue, trustees were to remain in possession until the issue attained their majority; but he directs that the trustees, while in possession, and Shaw afterwards, should continue to employ and retain Lawless as agent. Can there be a doubt that it was imperative on the trustees to retain him? If the trustees had removed him, unless they made a case for so doing, I should have had no hesitation in compelling [\*168] them to reinstate him. Now if it was \*imperative on the trustees to employ him during the minority, can I draw a distinction, and say that a different right was given by the same words to Shaw from that given to the trustees, particularly in a will where, as I have pointed out, the testator knew how to distinguish the powers which he gave according to the persons by whom and the period at which they were to be exercised? If imperative on the trustees it was equally so on Shaw when he succeeded to the estate. If you look at the language of the clause there can be no doubt as to the intention. It is in substance this: I have found him a faithful agent to myself, and it is my particular desire that you retain him in the management of the estate, and I will leave no doubt as to the fees he is to receive. The word "continue" is used in the first part of the clause, and in the second the words "retain and employ." These are strong words, importing a continuance and endurance as long as he conducts himself properly. In the preceding clause there is an absolute gift of 150*l.* for charity, and a direction that it should be paid to Lawless to be by him distributed. Can any

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one doubt that that is imperative? though merely a direction, it is nevertheless just as binding as the gift itself of the money to the poor. This is followed by the clause in question, "and it is also my particular desire, &c.;" these words, in connection with the gift in the preceding clause, import a gift also to Lawless himself; then it is said, Shaw is made tenant for life, and can you cut down his life estate? To this I answer, I leave him as I find him. The testator employed this gentleman to receive his rents and desired his devisee to continue him; \*this is in the nature of a condition imposed on the ten- [\*169] ant for life, and therefore the person who takes the estate must perform the condition. It is said that this was intended for Shaw's benefit. It may be so, but not exclusively; I have no means of forming a judgment whether it was or not. I cannot say whether the testator may not have intended a benefit to the estate itself; he certainly did, so far as he made it imperative upon the trustees to employ Lawless during the minority. A very young man was about to step into possession of an estate, the testator, therefore, might wisely say, I will take care to have a faithful agent employed for the benefit of the estate itself, I will at the same time make the office a reward to a tried agent for his past exertions.

Then it is said, suppose the testator recommended the devisee to employ a particular baker or tailor; well, suppose the testator did make such a condition in clear express terms, for it would not be implied; a man may devise an estate under any condition he pleases, provided it is not an illegal one. Estates have been devised to be held while a particular wall or tree stands; that may be very absurd, but yet a man may make an absurd condition or conditional limitation. It is one of the advantages of a free country, and is a great stimulus to industry, that a man has the privilege of devising his estate as he likes, and there is no power in the law to take away from him that right. In this instance I see nothing absurd or unnatural in the condition, or such as a prudent man might \*not impose, if [\*170] you consider it as a restraint on the tenant for life.

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If you say this is an office to be held at the mere will and pleasure of the devisee, you must argue that it is so by necessary implication: why imply this? if something is to be implied, why may not I imply that the testator did not intend it to be so? But then it is said, if the testator meant it to be a permanent office, why did he not so express himself? but I say, if he meant it as a removable office, why did he not express that intention? there could have been no difficulty in saying this: "I recommend you to employ Mr. Lawless as your agent as long as you think fit," that would have been a simple recommendation.

Now, as to the authorities: they appear to me to conclude this case; I cannot distinguish this case in principle from *Tibbets v. Tibbets*; (a) that case is this, a devise to a son recommending him to continue his cousins in the occupation of their respective farms as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents; that was held to amount to a trust for the cousins who had been tenants at will. Lord Eldon, in page 664, says, "with regard to the other question, it is clear, that recommendation in a will

where the object and the subject are certain, amounts to [\*171] trust, both the object and the \*subject must be certain, and the will must be construed with reference to a principle requiring the court to give effect to it, if a meaning can be found: different judges may put different constructions upon words, but it is difficult for any judge to say, that there is in the import of this clause that uncertainty that entitles him to say judicially that it has no effect. This is not like the plain uncertainty that occurs in the case of words of recommendation or confidence, applied to what shall be left at the death of the testator's wife, to whom the property is given in the first instance; there is clear uncertainty of the subject, as whether anything shall be left at the wife's death is left to her discretion, but it is extremely difficult to apply that principle to this case." There the property was given to the son absolutely with a recommendation to continue his cousins as tenants, so long as they should

(a) 19 Ves. 656.

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manage their farms in a husbandlike manner, not a word about conditions or covenants. I know of no case that presented more difficulty, as the plaintiffs there filled the character of tenants, and also partook of the character of legatees; there is more difficulty in that case than in the one before me, as the testator did not direct, but merely expressed a recommendation; the whole estate was given to the son, and to create a tenancy binding on the devisee was at least as inconvenient as to impose a gentleman upon the tenant for life as his agent. *Hibbert v. Hibbert* was a case of a different nature: the testator in that case intended a benefit to Mr. Humphreys, whom he directed to be the receiver; the testator there \*had no other estates than [\*172] West India estates; and Sir William Grant held, that as there were no other estates, and as the testator intended a benefit for Mr. Humphreys, he should have the benefit of being appointed consignee; thus going even beyond the words of the will to give a benefit to an agent. That case came frequently before the court, and I was myself engaged in it as counsel when it last came back on the Master's report, and that point was submitted to the court, and Mr. Humphreys is, at this moment, acting as consignee of the estate. Properly speaking, no receiver is required for West India property but a consignee; and the testator, who was a large West India proprietor, and knew the difference of the terms, could hardly be supposed to have confounded the term receiver with that of consignee. But in this case I am not called on to displace a single term in the will; on the contrary, to give effect to the words according to their natural meaning.

Another question raised in the argument was, whether this construction may not be attended with inconvenience. This is a proper consideration for every judge, if the matter be doubtful, but if the testator has clearly expressed his meaning, the judge has no business to consider whether the recommendation is inconvenient or not: there is no inconvenience to Lawless, but it is said it is an inconvenience to Shaw; I do not see that it is so, for if Mr. Lawless were to oppose the will of his employer, and



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conduct himself improperly, I should remove him without any hesitation ; and this court has power to do so, as circumstances \*would then arise which the testator did not [\*173] contemplate ; the devisee takes the estate from the testator, and he must take it in the manner (*modo et forma*) that the testator intended.

I have gone at length into this question, not from any difficulty I myself feel, but from sincere respect for the opinion of my noble and learned predecessor. I have given my best attention to the case, and repeatedly read the will, and I cannot adopt his construction. I must, therefore, reverse the former decree, and declare Lawless entitled to be continued as agent, and the costs of the suit to be paid to him. But as to the time that is past, I shall give no direction as to that, that ought to have followed as a matter of course from my present decision, but as the duty has not been performed, and as it is impossible for me to say it was not a case of doubt, and one requiring the decision of this court, I shall not carry back the right. If there be any question as to what are the usual fees, let there be a reference to the Master on the subject. If Mr. Lawless should consider this as a victory, and wish to retain the benefit of this decree, he must not abuse his power, but continue to act faithfully and honestly in the trust reposed in him by the testator. No costs of the rehearing.

“Reg. Lib.—Ordered that the said decree of the 29th day of May, 1833, be and the same is hereby reversed ; and it is further ordered, that the plaintiff be, and he accordingly is hereby [\*174] by declared entitled to continue to \*act as agent to the several estates of Kentstown, Veldanstown and Knockirk, in the pleadings mentioned. And it is further ordered, adjudged and decreed, that the plaintiff be and he is hereby declared to be entitled under the provisions of said will, to be employed and retained by said defendant William Shaw, in the receipt of the rents, issues and profits of the lands of Cruisestown, in the pleadings mentioned, with its subdenominations, as

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land agent thereof. And it is further ordered that the plaintiff be, and he accordingly is hereby also declared entitled under the provisions of said will, to be employed and retained by said defendant William Shaw, in the receipt of the rents, issues and profits, of all or any lands, tenements or hereditaments, which shall or may be hereafter purchased for said defendant's use, with any part of the residue of the personal property of the said William Alexander Shaw, deceased, in the pleadings mentioned, pursuant to the trust for that purpose created by the said will, as like land agent thereof, as prayed by the plaintiff's bill. And it is further ordered, adjudged and decreed, that the said defendant William Shaw do accordingly permit the plaintiff to act as such agent of said estates, and each of them respectively during the life of him the said defendant, William Shaw, and to retain out of the rents thereof the usual fees payable to receivers. And if the said parties, plaintiff and defendant, differ as to the amount of such receiver's fees, then and in such case, it is further ordered that it be, and is hereby referred \*to Thomas [\*175] Goold, Esq., the Master in this cause, to settle the same.

And it is further ordered that the plaintiff be, and he is accordingly hereby decreed, entitled to his costs of this suit, to be paid him by the said defendant (save the costs of this rehearing) as to which, it is further ordered that the said parties, plaintiff and defendant, do respectively abide their own costs; and accordingly the plaintiff may make up and enroll this decree with costs as aforesaid, to be taxed by the said Master against the said defendant, William Shaw, &c.

The following words in a will have been held sufficiently imperative to create a trust: "*desire*," *Brest v. Offley*, 1 Cha. Rep. 130; *Harding v. Glyn*, 1 Atk. 469; *Pushman v. Filliter*, 3 Ves. 8; *Cary v. Cary*, 2 Sch. & Lef. 189; and the same word with a power of selection, *Cruwys v. Colman*, 9 Ves. 319: "*will and desire*," with a power of selection, *Birch v. Wade*, 3 Ves. & Bea. 198; *Forbes v. Ball*, 3 Mer. 437: "*request*," *Nowlan v. Nelligan*, 1 B. C. C. 489; *Pierson v. Garnet*, 2 B. C. C. 226; *Eade v. Eade*, 5 Mad. 118: "*entreat*," with a power of selection, *Prevost v. Clarke*, 2 Mad. 458: "*fullest confidence*," and "*not doubting*," *Massey v. Sherman*, Amb. 520; *Wright v. Atkyns*, 17 Ves. 255; S. C. affirmed, 19 Ves. 299, and Coop. 111; Turn. & Russ. 157; *Parsons v. Baker*, 18 Ves. 476; "*hoping*," *Harland v. Trigg*, 1 B. C. C. 143-144: "*authorize and empower*," *Brown v. Higgs*, 4 Ves. 708; S. C. 5 Ves.

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495; 8 Ves. 561; affirmed in the House of Lords, 18 Ves. 192; but in *Bull v. Vardy*, 1 Ves. Jun. 270, the word "empower," was held to amount to a naked authority merely, the devisee taking no interest in the fund to be appointed by her: "recommend," *Matim v. Keighley*, 2 Ves. Jun. 333; *ibid*, 529, overruling *Cunliffe v. Cunliffe*, Amb. 696; *Kirkbank v. Hudson*, 7 Price, 212-220; *Tibbitts v. Tibbitts*, 19 [\*176] Ves. 656; *Horwood v. West*, 1 Sim. & Stu. 387; but in *\*Meggison v. Moore*, 2 Ves. Jun. 630, this word was held not to be imperative, upon the intent of the testator, to vest a discretion in the devisee. Nor will words expressing expectation merely, create a trust; *Lechmere v. Lavie*, 2 Mylne & Keen, 197; *Beason v. Whillam*, 5 Sim. 22.

And in the following cases the *subject* was not considered sufficiently certain, the amount being made to depend on the will of the first taker; *Bland v. Bland*, 2 Cox, 349; *Wynne v. Hawkins*, 1 B. C. C. 179; *Strange v. Barnard*, 2 B. C. C. 585; *Pushman v. Filliter*, 3 Ves. 8; *Wilson v. Major*, 11 Ves. 205; *Eade v. Eade*, 5 Mad. 118; *Curtis v. Rippon*, 5 Mad. 434.

And in *Harland v. Trigg*, 1 B. C. C. 142; *Hayter v. Joinville*, 3 East. 172; under the circumstances, the *object* was not considered sufficiently ascertained by the word *family*; see observations on this case by Sir William Grant in 17 Ves. 262, and by Lord Eldon in Coop. 122. This word, however, may be considered as having a precise signification; in a devise of freehold it has been held descriptive of the heir at law; *Chapman's Case*, Dyer, 333, b.; *Counden v. Clarke*, Hob. 33; *Doe v. Over*, 1 Taunt. 263; *Doe v. Smith*, 5 M. & S. 126; *Wright v. Atkins*, *ubi supra*; and in bequests of personal estate as synonymous with the next of kin; *Cruwys v. Colman*, 9 Ves. 323; but the construction of the term varies according to the context of the will; *Barnes v. Patch*, 8 Ves. 604, and *M'Leroth v. Bacon*, 5 Ves. 166. See observations as to the effect of this word where freehold and personal estate are limited in the same will; *Wright v. Atkins*, *ubi supra*. And the word *relation* has received a definite signification by being construed next of kin according to the Statute of Distributions; *Anon*, 1 P. Wms. 327; *Edge v. Salisbury*, Amb. 70; and the note to that case in the second edition, and the note to *Brandon v. Brandon*, 3 Swans, 319, where all the cases are collected.

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## \*WARD v. DYAS.

1835: 3d February.

A father, on the marriage of his daughter M., covenanted with the intended husband to pay a sum of 500*l.*, "the marriage portion of his daughter," to be vested in trustees upon trust to pay the said M. 30*l.* a year, the interest thereof) during her life, and after her death and that of her husband, to hold the same to the use of the issue of the marriage. The husband died in the lifetime of his wife, and there was no issue of the marriage. Held—that as to so much of the 500*l.* as was not exhausted by the uses of the settlement there was a resulting trust for M.

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BY a settlement of the 24th of January, 1802, made between James Adams of the first part, J. Dyas and Mary his daughter of the second part, and Richard Irwin and John Dyas, trustees, of the third part, reciting a marriage intended to be had between the said James Adams and Mary Dyas, the said James Adams in consideration thereof, and the sum of 500*l.*, the marriage portion of the said Mary, to be paid to the uses therein-after mentioned, and in order to make a provision for the said Mary, and the issue of said intended marriage, conveyed to the said trustees, the several farms therein mentioned, upon trust, amongst other things, to pay to the said Mary, out of the rents, &c., of said lands, and from out of the interest of said sum of 500*l.*, the marriage portion of said Mary, an annuity of 60*l.* during her natural life, as her jointure in bar of dower, &c., and subject thereto, to the issue of the said intended marriage. And the said J. Dyas, for the consideration aforesaid, did for himself, his heirs, executors, &c., covenant with the said James Adams, his executors and assigns, that he the said J. Dyas would "pay, or cause to be paid, the said sum of 500*l.*, the marriage portion of the said Mary Dyas, with interest for the same from the date hereof, at the rate of 6*l.* for every 100*l.* by the year, in manner and to be vested in the said Richard Irwin and \*John Dyas in trust," and for the uses, thereafter [\*178] mentioned, viz., that he the said J. Dyas, his heirs, executors, &c., would pay or cause to be paid unto the said Richard Irwin and John Dyas, and the survivor of them, &c., the sum of 30*l.* yearly, the interest of the said 500*l.*, for such time as the said principal sum of 500*l.* should remain in his hands unpaid, the said interest to be paid and payable half yearly to the said Richard Irwin and John Dyas, or the survivor of them, and to be paid by them to the said Mary Dyas in part payment of her said jointure of 60*l.* a year during the term of her natural life, and from and after the death of the said James Adams and Mary Dyas, his intended wife, then to hold the said sum of 500*l.* and the accruing interest thereof to the said trustees, &c., in trust for the issue of the said intended marriage, as said James Adams and Mary (or the survivor of them) should appoint, and in de-

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fault of appointment, then amongst the issue of the said intended marriage share and share like.

James Adams died in the lifetime of his wife Mary, and there was no issue of the marriage; the question was, whether the personal representatives of J. Dyas (the father) were entitled to the principal sum of 500*l.* as a resulting trust.

THE LORD CHANCELLOR:—I cannot now remodel this settlement. The question simply is, whether the father of [\*179] this young lady gave her \*500*l.* as a marriage portion? or whether he dedicated this sum to certain trusts only, so as to leave the interest undisposed of, as a resulting trust in himself. There is, undoubtedly, a resulting trust, so far as the whole is not exhausted by the trusts of the settlement: but the question is for whom? If you consider it merely as a dedication of the 500*l.* to the uses of the settlement, then the trusts are for the wife for life, remainder to the issue, as the husband and wife, or the survivor shall appoint, and in default of appointment to the issue equally; if there be no issue, then there is a resulting trust for the father. But if this sum\* is considered as a marriage portion, it is clear that there is a resulting trust for the daughter to whom the portion is given. My opinion is, that the 500*l.* is to be considered as a portion. The words of the settlement are, that "in consideration of the said intended marriage, and of the sum of 500*l.*, the marriage portion of the said Mary Dyas, to be paid to the uses," &c., &c. If it had been paid there could have been no doubt that it was a marriage portion, which signifies a sum of money transferred from a parent to a child on marriage, and what is not disposed of by the settlement will result to the child. The father provides the portion and the child settles it. There is a covenant on the part of J. Dyas that he would pay the said sum of 500*l.*, the marriage portion of the said Mary, with interest: that is an absolute covenant to pay this sum. There is also another covenant on the part of J. Dyas to pay to the trustees the interest of 3*l.*, so long as said sum of 500*l.* should remain in his hands, and the

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\*trustees are to hold this sum upon trust to pay 30*l.* a [\*180] year to Mary during her life as part of her jointure, and after the death of James Adams and Mary Dyas to the use of the issue of the marriage. I must consider this, in common parlance, a handing over of the 500*l.* by the father to his daughter, but inasmuch as he had not the money ready, he covenants to pay it. I consider it as a sum of money provided for the daughter, and as the uses of the settlement have not exhausted the whole interest in this sum, what has not been exhausted remains with the daughter, and she is the person entitled to it.

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## MORGAN v. BRUEN AND OTHERS.

1835: 9th & 10th February.

A person who is *particeps criminis* is not entitled to the costs of setting aside bonds given for an illegal consideration.

There is no public policy in giving a person the costs of setting aside an illegal transaction which he has entered into with his eyes open.

THE original bill in this case was filed by Morgan, the administrator of Lord Cremorne, to restrain the defendant H. Bruen and others from proceeding at law upon certain judgments obtained against the late Lord Cremorne, upon bonds executed by him to the defendant Bruen. The defendant in his answer admitted that part of the consideration for the bonds was money won at play and at horseracing, but insisted that part thereof consisted of certain legal debts, namely, *wagers won by him from Lord Cremorne on matches run between their own horses*. The cause was heard on the 3d of May, 1831, and the bonds and judgments were ordered to stand as securities for so much only of the consideration as was a *bona fide* legal consideration, and it \*was referred to the Master to inquire and report [\*181] whether any and what part thereof was a *bona fide* consideration, and to take an account of the sums due to the defendant (if any) for principal, interest and costs on foot of said bonds.

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The Master made his report, finding that there was no valuable *bona fide* or legal consideration given for the said bonds or for any of them. The cause came on to be heard upon exceptions to this report, when all the exceptions were overruled with costs; the counsel for the defendant having declined to take a case to a court of law which was offered by the Lord Chancellor on the legal question, the subject of their third exception, which was to the following effect: For that the said Master had not given to the defendant, H. Bruen, credit for the sum of 227l. 10s. being the amount of a stake won by the said defendant from the late Lord Cremorne on a certain race run between a horse called Oisau, the *bona fide* property of the said H. Bruen, and a horse called Queensbury, the *bona fide* property of the said late Lord Cremorne. Whereas, &c.

The only remaining question was, whether the plaintiff was entitled to the costs of the suit.

Mr. *Lefroy* for the plaintiff.

The defendant has failed to show that any part of the consideration of these bonds was legal. The relief is given by [\*182] \*the court not on account of the individual, but on the grounds of public policy, and parties should not be discouraged from coming in to this court to vindicate a public principle.

Mr. *Warren* and Mr. *Brewster*, for the defendant.

If there be any guilt, both parties are equally implicated, and in *Debenham v. Ox*,<sup>(a)</sup> Lord Hardwicke, although he gave relief on the grounds of public policy, yet, owing to the part the plaintiff had taken (being *particeps criminis*), refused to give costs on either side. It has never yet been decided in this country that wagers between the owners, themselves, of race horses are illegal; and they are legal in England.

(a) 1 Ves. Sen. 276.

THE LORD CHANCELLOR:—I shall give no costs of the suit generally; that is, so far as the bill seeks to set aside the bonds, but I shall give to the plaintiff the costs occasioned by that part of the defence in which the defendant asserts that money was due to him on other transactions besides these racing transactions. In *Debenham v. Ox* no costs were given; that was a case in which a bond was given by the plaintiff to the defendant's wife by way of reward for the influence she used over another's estate for the benefit of the obligor. In that case Lord Hardwicke says, "that if it had not been for public policy the plaintiff could hardly come \*here for relief." In [\*183] all of that class of cases the court has set the securities aside, not for the sake of the party but for the benefit of the public; and where the party is himself to blame, the court will withhold his costs. It is one thing to give to the plaintiff relief on the grounds of public policy, but quite a different thing to allow him the costs of obtaining that relief. In *Jackman v. Mitchell*,<sup>(a)</sup> the relief having been given not on account of the individual but of the public, the decree was made with costs. Now it is quite right to set aside a transaction on account of public policy; but there is no public policy in giving a man the costs of setting aside an illegal transaction which he has entered into with his eyes open. You strike at the root of the transaction by not allowing it to stand; but, on the other hand, you are not to encourage a man to enter into such dealings by giving him costs, and by making the party who does not seek relief pay for the party who does.

In *Bowes v. Heaps*,<sup>(b)</sup> although the plaintiff was relieved from an unconscientious bargain, and the amount was cut down, yet the security was allowed to stand for the principal, interest, and costs. In this case I will not give the general costs of the suit: the defence set up is this; admitting that part of the consideration is impeachable, yet there are other parts of it free from objection and which may be sustained. This has occasioned considerable expense, and as the defendant has totally failed

(a) 13 Ves. 581.

(b) 3 Ves. & Bea. 117.



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[\*184] on \*that ground, and has not established any demand against Lord Cremorne, he must pay whatever costs have been occasioned by that defence.

The English statutes against gaming are the 16 Car. 2, c. 7; 9 Anne, c. 14, extended by 18 Geo. 2, c. 34. The corresponding Irish Statutes, with some variations, are the 10 Wm. 3, c. 11; 11 Anne, c. 5.

The 13 Geo. 2, c. 19, Eng., has legalized horseracing, where the stakes run for are 50*l*. or upwards. The corresponding Irish statute is the 13 Geo. 2, c. 8, which imposes penalties where the stakes run for are less than 20*l*. But as this statute does not contain the provisions of, and differs in other respects materially from, the 13 Geo. 2, c. 19, Eng., it is generally considered that it has not had the effect of legalizing horseracing in this country, under any circumstances. The 31 Geo. 3, c. 43, Ir., prohibits horseracing within nine miles of the Castle of Dublin, and empowers justices, upon view or information, to seize any horse that shall run at such race.

The following are some of the principal decisions upon the English Acts: A horse-race or betting thereat above 10*l*., is within the 9 Anne, c. 14; *Goodburn v. Marley*, 2 Stra. 1159; *Blaxton v. Pye*, 2 Wils. 309; *Clayton v. Jennings*, 2 Wm. Black. 706. But a wager under 10*l*. is good, if the stakes be 50*l*. or upwards; *Good v. Elliott*, 3 T. R. 705; *M'Alister v. Haden*, 2 Camp. 438. But not if the wager be above 10*l*.; *Shillito v. Theed*, 7 Bing. 405. And no wager is legal if the stakes be under 50*l*.; *Johanson v. Bann*, 4 T. R. 1.

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\*MUSKERRY v. CHINNERY.

1835: 4th, 11th & 12th February.

Husband and wife, by a post-nuptial settlement, convey part of the wife's estates to a trustee to the use of the husband for life, remainder to their eldest son for life, &c., with an ultimate remainder in fee to the husband, and a power to him to lease "for any time or term of years or lives and with or without covenants for renewal, and in case of the determination of all or any of the aforesaid lease or leases, to make new of other leases thereof in manner aforesaid, and with or without any fine or fines as he should think fit." He was also empowered "to raise or levy, by sale or mortgage, any sum or sums of money not exceeding in the whole 20,000*l*. or to charge the premises therewith," for such uses as he should appoint; and to charge to any amount for younger children. The husband and wife afterwards executed three leases of portions of the estates comprised in the settlement, for terms of 999 years, upon which fines were taken. One of the leases contained a clause permitting the lessee to graff and burn the surface, and also a clause of surrender; and another contained clauses making the lessee dispunishable for waste, and permitting him to cut timber, &c., and to graff and burn the surface, and in

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this lease was included part of the wife's estate not comprised in the settlement; the latter lease, and also the third lease, were made subject to existing freehold leases. The amount of the fines received, upon the making of these and other leases, was 10,208*l*. The husband subsequently mortgaged these estates, subject to the aforesaid leases, for a sum of 10,500*l*. The mortgagee filed a bill of foreclosure, in the Court of Exchequer, and obtained a decree, in pursuance of which the lands were sold subject to the leases. The first tenant in tail under the settlement filed a bill impeaching the said decree, and also the leases, as having been made contrary to the leasing power. While the cause was at hearing the plaintiff entered into a compromise with the purchaser. Held—that the consideration of the question, as to the validity of the sale, having been by these means withdrawn from the court, the leases could not be impeached in the absence of the purchaser, and that the plaintiff's bill must be dismissed. Held also—that the leases were not an undue execution of the leasing power.

A bill impeaching leases, and also seeking to set aside a sale made subject thereto, is not multifarious.

If an estate be sold subject to a lease, the seller cannot afterwards impeach the lease, unless he can at the same time impeach both the sale and the lease.

Under a power to lease at any rent, a nominal rent may be reserved.

Under a power to charge any sum for younger children the whole estate may be disposed of.

*Semble*—that a lease may be a good execution of a power to raise or levy by sale or mortgage a certain sum, or to charge the estate therewith.

Where the power is unlimited, a clause permitting waste does not invalidate the lease.

Where the transaction is *bona fide*, and the terms of the power do not require the number of years to be absolute, a clause of surrender does not vitiate a lease.

A lease under an unrestricted leasing power, including lands not comprised in the settlement, and by which one entire rent is reserved, is not invalid, for, if the lessee be evicted, there would be an apportionment of the rent at law in favor of the person entitled under the settlement.

JOHN FITZMAURICE being seised in fee of the Springfield estate, in the county of Limerick, charged with 1,000*l*. for each of his two sisters, by a settlement \*of the 16th [186] January, 1732, upon his marriage with Anne O'Dell, conveyed the said Springfield estate to trustees to the use of himself for life, with remainder to the first and every other son, &c., of the marriage, in tail male, with an ultimate remainder to himself in fee, and reserved a power to charge 4,000*l*. for younger children. There was issue of the marriage one son, John (the younger), and one daughter; and in the year 1759, upon the marriage of the latter, John Fitzmaurice (the elder), by virtue of

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the power in his marriage settlement, charged the said Springfield estate with the sum of 4,000*l.*, and with the sum of 1,000*l.* (the portion of one of his sisters which he had paid off), and conveyed the said lands to trustees for a term of 200 years upon trust to raise said sum of 5,000*l.* by sale or mortgage. This charge subsequently became vested by mesne assignments in one John Godley. Some time previous to the year 1760, John Fitzmaurice (the elder) had purchased certain fee simple estates called Farrihy in the county of Limerick, and Gortaheedy in the county Cork; and after the death of his wife Anne, having married Hester Littleton, he conveyed to trustees, by a post-nuptial settlement of the 23d of April, 1763, the said Farrihy estate and all other estates in the county Limerick which he had power to dispose of, to the use of himself for life, remainder to Hester his wife for life, to whom he also granted a life use after his own decease in his personal estate. John Fitzmaurice (the younger) died in January, 1775, in the lifetime of his father, intestate, leaving an only child Anne. In the same [\*187] year John Fitzmaurice (the elder) died also \*intestate, and without any issue of his second marriage, leaving Anne his granddaughter, his heiress at law and Hester his widow, him surviving.

On the 16th of May, 1775, Anne being then a minor, married Sir Robert Tilson Deane, who was afterwards created Baron Muskerry; and on the 20th of June, 1776, in order to terminate differences which had arisen between Hester, the widow of John Fitzmaurice (the elder) and the said Sir Robert, touching the real and personal estates of the said John (the elder), a deed of compromise was executed between the said Hester of the first part, Sir Robert and Anne his wife, of the second, and trustees of the third and fourth parts; whereby, after reciting the settlement of 23d of April, 1763, in consideration of said Hester assuring to the said Sir Robert all her right and interest in and to the real and personal estate of her late husband, she, the said Hester, and said Sir Robert conveyed to trustees the Springfield and Farrihy estates, and the lands of Gortaheedy in

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the county Cork, for a term of ninety-nine years, with powers to lease or mortgage the same, to secure to the said Hester an annuity of 1,083 6s. 8d. during her life in lieu of all her demands, and subject thereto in trust for the use of Sir Robert and Anne, his wife, and the heirs and assigns of the latter.

In April, 1779, the said Anne attained the age of twenty-one, and there being at that time two sons of the marriage, a settlement was executed on the 25th of May, 1779, between said Sir Robert and Anne his wife, \*of the first part, [\*188] and Thomas Lloyd of the second part, whereby, for assuring the lands therein mentioned, and for making a provision for a jointure for said Anne, and a further provision for the children of the marriage, they, the said Sir Robert and Anne his wife, granted unto the said Thomas Lloyd, his heirs and assigns, the Springfield and Farrihy estates (the property of said Anne) in the county Limerick, to the use of the said Sir Robert for life, without impeachment of waste, remainder to the said Anne for life, without impeachment of waste, remainder to Robert F. Deane, their eldest son for life, and to his first and every other son in tail male, with remainder to the second son John F. Deane for life, without impeachment of waste, &c., &c., with an ultimate remainder in fee to said Sir Robert. And it was thereby agreed, "that it should and might be lawful to and for the said Sir Robert from time to time and at all times during his life, to lease or demise all or any part or parts of the aforesaid towns, lands and premises for any time or term of years or lives, and with or without covenants for renewal, and in case of the determination of all or any of the aforesaid lease or leases respectively, from time to time to make new or other leases thereof in manner aforesaid, and with or without any fine or fines as he should think fit;" and it was also agreed "that it should and might be lawful to and for the said Sir Robert to charge and incumber all and singular the said towns, lands and premises aforesaid, or any part or parts thereof, with any sum or sums for the younger child or children of the said Sir Robert, begotten or to be begotten on the said Anne, in such \*propor- [\*189]

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tions and manner, and payable at such time or times as he should by deed or will appoint." And it was further agreed, "that it should also be lawful to and for the said S r Robert to raise and levy, by one or more sales or mortgages of all or any part of the said premises, any sum or sums of money not exceeding in the whole the sum of 20,000*l.*, or to charge the premises aforesaid therewith, to and for such use and uses as he should at any time or times by deed or will appoint." Sir Robert and his wife then covenanted to levy one or more fine or fines before the end of the then ensuing Trinity Term, unto the said Thomas Lloyd and his heirs, of all the said towns and lands, to enure to the uses of said settlement. On the back of the deed there was an indorsement signed and sealed by the said Sir Robert and Anne his wife, in the following words: "It was agreed between the parties within mentioned, previous to the execution of the within deed, that the within named Robert F. Deane and John F. Deane, and every other child of said Sir Robert Tilson Deane and Anne his wife, who shall, under the limitations therein mentioned, be in possession of the premises therein mentioned, or any part thereof, to make leases of the whole or any part thereof for any term not exceeding three lives or thirty-one years, provided such lease be made to commence in possession, and that the best improved yearly rent that can be had for the same at the time of making such lease be reserved thereby, and that no fine or other consideration shall be taken for or on [\*190] account \*of the making thereof." In the following Trinity Term, Sir Robert and Anne his wife, in pursuance of their covenant, levied a fine of the lands comprised in said settlement; but the lands of Gortaheedy, also the wife's property, were not included either in the settlement or in the fine.

By indenture bearing date the 26th of August, 1779, Sir Robert and Anne his wife, in consideration of 1,000*l.*, demised to William Sheehy for a term of 999 years, at the rent of 20*l.*, the lands of Rosnerilane and also part of Springfield, subject to a lease made of the latter on the 28th of February 1746, by

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John Fitzmaurice to Isaac Howell for three lives, at a rent of 40*l.* 3*s.*: and Sir Robert covenanted for himself and his wife, their heirs, executors, &c., to levy one or more fine or fines unto the said William Sheehy, his executors, &c., of all the premises thereby demised. The lands included in this lease were part of the premises comprised in the settlement of the 25th of May, 1779.

By indenture of lease, bearing date the 28th of October, 1779, Sir Robert and Anne, his wife, in consideration of a sum of 2,000*l.*, demised to Roger Sheehy, the younger, the lands of Clonmore (being part of the lands comprised in said settlement of the 25th of May, 1779), for a term of 999 years, at a yearly rent of 150*l.* This lease contained permission to the said Roger Sheehy, his executors, &c., during the continuance of the term, to graff, cut, and burn the soil and surface of the lands \*thereby demised, without incurring or being liable to [\*191] any penalty or forfeiture for the same, notwithstanding the several Acts to prevent the pernicious practice of burning land; and it also contained a clause empowering the said Roger Sheehy to quit and surrender the demised premises at the end of every year of the said term, upon giving six months' notice in writing. There was also a covenant on the part of Sir Robert and wife, to levy one or more fine or fines to the said Roger Sheehy, his executors, &c., of all the said lands, for the more effectual confirming the said demise.

By indenture of lease, bearing date the 4th of June, 1780, Sir Robert and Anne, his wife, in consideration of a sum of 5,780*l.*, demised to Roger Sheehy, the elder, another portion of lands situated in the county of Limerick, and also the lands of Gortaheedy, in the county of Cork (and which also, with the exception of Gortaheedy, were part of the lands comprised in the settlement of the 25th of May, 1779), subject, nevertheless, to the remainder of the terms unexpired of different leases then subsisting and set out in a schedule annexed to said lease, to hold the same for the term of 999 years, at the yearly rent of 50*l.*

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without impeachment of waste; and with power to the lessee, his executors, &c., to cut, fell and carry away all timber and other trees then growing, or which thereafter should grow on the said demised premises, and to graff and burn any part of said premises, as often as he or they should think proper; there was

also a covenant on the part of Sir Robert and wife, to [\*192] levy a fine or fines to the said Roger \*Sheehy, his executors, &c., for the effectual confirming the said demise.

The schedule referred to, specified five leases for lives, of different portions of said lands, as subsisting at the date of the said demise, and which were all executed previous to the settlement of 1779; the rent reserved by said lease was less than the former and ancient rents. All the aforesaid leases to the Sheehys contained the usual clauses of entry and distress, &c., and a reservation of the royalties. No fines were levied by the said Sir Robert and his wife, pursuant to the covenants in said leases.

The sum raised by Sir Robert, by means of fines taken upon these and other leases, amounting altogether to 10,208*l*.

Sir Robert, by a deed bearing date the 29th of April, 1780, reciting the settlement of the 25th of May, 1779, and the power to him therein contained to raise by sale or mortgage any sum not exceeding 20,000*l*., mortgaged to St. John Chinnery the Springfield and Farrihy estates (subject to the before-mentioned leases to the Sheehys), for a sum of 6,000*l*.

In the year 1781 Sir Robert was created Lord Muskerry; and by a deed, bearing date the 7th of April, 1783, reciting the settlement of the 25th of May, 1779, and the mortgage of the 29th of April, 1780, Lord Muskerry executed a further mortgage to St. John Chinnery, of the Springfield and Farrihy [\*193] estates, subject to \*the before-mentioned leases to the Sheehys, for a sum of 4,500*l*.

The annuity to Hester Fitzmaurice having become largely in arrear, she, on the 2d of February, 1780, filed a bill in the Court

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of Chancery against Robert Lord Muskerry, and to which the lessees in the several leases before mentioned were made parties, praying that those leases might be declared fraudulent and void as against her, and that an account might be taken of the sum due to her on foot of her annuity, &c., and that the same might be raised by a sale of the lands comprised in the trust term created for securing the said annuity. In June, 1790, Hester Fitzmaurice died, and thereupon Lord Westcote, her executor, revived the cause, and filed an amended bill, making Sir B. Chinnery, who was the personal representative and the heir at law of St. John Chinnery, his brother, a party, and putting in issue the said two deeds of mortgage for 6,000*l.* and 4,500*l.*; all the defendants, except Lord and Lady Muskerry, answered, and in December, 1779, there was a decree to account. On the 27th of January, 1802, the Master made his report, finding that 10,819*l.* was due to Lord Westcote, as representative of Hester Fitzmaurice; and that a principal sum of 5,000*l.* was due to Godley on foot of the charge created by the settlement of 1759. On the 18th of November, 1802, the case was heard before Lord Redesdale, who directed that the sum of 10,819*l.* due to Lord Westcote, should be raised by mortgage of the said estates, and that the trustees of the term of ninety-nine years (by which the annuity was secured) \*should execute mortgages of [\*194] the remainder of the term to a trustee to be named by Lord Westcote; and also declared that the several leases to Roger Sheehy the elder, Roger Sheehy the younger, and William Sheehy, were fraudulent and void as against the said Hester Fitzmaurice and her trustees and the said Lord Westcote, and that the full and fair rents for the said estates, discharged from the said leases, ought to have been paid from time to time to the receiver appointed in the said cause, and referred it to the Master to set fair rents on the estates comprised in said leases, and to take an account of what remained due for said rents, after giving credit to the tenants for the sums paid by them to the receivers in the said cause; and also declared that, in case the said tenants should redeem the said mortgage by payment of what should be found due for rents beyond the rent reserved in their respective

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leases, or by payment out of their own money, they should be entitled to stand in the place of the said Lord Westcote for so much as they should pay beyond the rent reserved by their respective leases.

On the 20th of November, 1784, Sir B. Chinnery, in the name of his brother, St. John Chinnery, filed a bill in the Court of Exchequer, against Lord and Lady Muskerry, to foreclose the mortgages of the 29th of April, 1780, and the 7th of April, 1783, but pending said cause St. John Chinnery died without issue, leaving his brother, Sir B. Chinnery, his heir at law, whom he also appointed his sole executor.

[\*195]     \*By a deed, dated the 11th of December, 1802, Lord Westcote, in consideration of a sum of 4,000*l.*, assigned to Sir B. Chinnery the sum of 10,819*l.*, and the full benefit of the decree of the 18th of November, 1802; and by an indenture of the same date the trustees of the term of ninety-nine years, (created by the deed of 1779, to secure the annuity to Hester Fitzmaurice), by the direction of Lord Westcote, and in pursuance of the decree of 18th November, 1802, mortgaged the lands comprised in said term to the said Sir B. Chinnery, his executors, administrators and assigns.

In 1804 Sir B. Chinnery revived the Exchequer suit, and obtained a decree to account; and in February, 1806, a sum of 20,085*l.* 7*s.* 9 1-2*d.* was reported due to him (on foot of the said mortgages executed to said Chinnery), and also 10,819*l.* as assignee of Lord Westcote, and 5,000*l.* was reported due on foot of Godley's mortgage. It appeared that this charge was assigned by Godley to Sir B. Chinnery pending the same cause. On the 19th February, 1807, there was a decree in the Exchequer cause for a sale of the said Springfield and Farrihy estates for the payment, with interest and costs, of the sum reported due on foot of said mortgages, subject nevertheless to the debts decreed to the said Godley and Lord Westcote, and to the remedies for the recovery thereof, pursuant to the decree of the 18th of No-

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vember, 1802, and also subject to the several leases mentioned to be made to Roger Sheehy the elder, Roger Sheehy the younger, and William Sheehy. In \*1808 Sir B. [\*196] Chinnery died, having bequeathed to his two sons the sums due on foot of said several mortgages, and on foot of Lord Westcote's demand, and appointed his widow, Alice Chinnery, his executrix, who proved his will and revived the suit in the Court of Exchequer.

Pursuant to the final decree of the 19th of February, 1807, in the Exchequer suit, the Springfield and Farrihy estates were set up for sale, subject to Godley's and Lord Westcote's demand, and the said several leases to the Sheehys; and on the 8th of May, 1812, Alice Chinnery, the widow and executrix of Sir B. Chinnery, became the purchaser, and the said estates were accordingly conveyed to her, but the deed of conveyance was executed by the Chief Remembrancer only. Robert Lord Muskerry died in July 1818, leaving Anne Lady Muskerry, his widow, and John Thomas Deane (who thereupon became Lord Muskerry), and the present plaintiff, Mathew Deane, his only children, him surviving.

The original bill in this cause was filed on the 6th May, 1819, by John Thomas Lord Muskerry and Anne Dowager Lady Muskerry. In the year 1824, John Thomas Lord Muskerry died without issue, and thereupon Mathew Deane became Lord Muskerry. Anne Lady Muskerry died in the year 1830.

An amended bill was filed by Mathew Lord Muskerry, on the 3d of June, 1826, against the widow and children of the late Sir B. Chinnery, and the representatives of the Sheehys, \*the lessees, which, after stating a variety of dealings [\*197] and transactions between Robert Lord Muskerry and Sir B. Chinnery, in addition to the several matters before mentioned, charged (among other things) that the said several leases were not authorized by any power in the settlement of 1779; that Lord Muskerry having raised 10,208*l.* by taking fines upon

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leases, and also 10,500*l.* by the said mortgages to St. John Chinnery, had exceeded his power to charge under the settlement of 1779, which limited him to 20,000*l.*; and that said mortgages, having been made subject to said fraudulent leases, were contrary to the intent and meaning of the power; that the account in the Exchequer cause was fraudulent and erroneous, and that if due credits had been given, nothing would have been found due on foot of said mortgages; that the decree in said cause was also erroneous, in directing a sale for the payment of a subsequent mortgage, subject to a prior mortgage and other prior incumbrances, without providing for the payment thereof out of the produce of the sale, and likewise impeached the said decree on several other grounds; and prayed that the leases to the Sheehys might be declared not to have been warranted by the leasing power in the settlement of 1779, and fraudulent and void as against the plaintiff, claiming in remainder under the said settlement, and that the mortgages to St. John Chinnery might be decreed not warranted by any of the powers in said settlement, and void as against the plaintiffs, and that the Exchequer decree might be decreed as fraudulently obtained, and for an [\*198] account of what was due to \*Alice Chinnery, as representative of Sir B. Chinnery, on foot of Lord Westcote's and Godley's demands, and that, in taking such account, such sums only should be allowed as Sir B. Chinnery actually and *bona fide* paid, as assignee of said Lord Westcote and said Godley, respectively; and in case the said mortgages or either of them should be deemed a subsisting lien on said estates, then, that an account might be taken of the sums due on foot thereof, and that, in taking such accounts, such sums only should be allowed as were actually and *bona fide* paid for the same, and upon payment thereof, that plaintiffs might be entitled to redeem said mortgaged premises, and for a reconveyance of the same; and for an account also of the sums received by Sir B. Chinnery or his representatives, or which without wilful default he or they might have received out of the Springfield and Farrihy estates, &c., &c.

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The cause was heard before Lord Plunket, on the 29th of November, 1832, when his Lordship directed that a case should be submitted for the opinion of the Court of Common Pleas, upon the following questions, viz. : " Whether the leases bearing date respectively the 26th day of August, 1779, the 28th day of October, 1779, and the 14th of June, 1780, made by Sir Robert Tilson Deane, who was afterwards created Baron Muskerry, and Dame Anne his wife, to William Sheehy, Roger Sheehy the younger, and Roger Sheehy the elder, respectively, or any or either, and which of the said leases were or was warranted by any power \*contained in the deed bearing [\*199] date the 25th day of May, 1779." And all further directions were reserved until the opinion of the Court of Common Pleas should be had.

The Court of Common Pleas certified that the said leases were not warranted by any power contained in the deed of settlement, bearing date the 25th day of May, 1779.

Alice Chinnery died intestate after the argument of the case in the Common Pleas, leaving her two sons, the Chinnerys, her surviving, and the cause now came on for further directions upon bill and answer and this certificate.

The *Attorney-General*, on behalf of the plaintiff, opened the foregoing facts to the court.

Mr. *Lefroy*, when the cause was again called on, stated that the court would be relieved from the necessity of hearing a considerable branch of the case, as there was an arrangement in progress with respect to the demands on the foot of the mortgages, in which the counsel on both sides had concurred ; but that a difficulty arose from the circumstance of the Chinnerys, in whom the mortgages were vested, being lunatics ; that a reference therefore was necessary, and that a petition had accordingly been presented.

The *Lord Chancellor* said he would make an order upon the petition at once, and refer it to the Master to inquire and

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[\*200] \*report whether the proposed compromise would be for the benefit of the lunatics, and added that he should wish to have the assistance of one or two of the law judges in deciding the remaining question as to the validity of the leases.

Accordingly that question came on to be argued before the Lord Chancellor, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron.

The *Attorney-General*, Mr. *Lefroy*, and Mr. *Furlong* for the plaintiff.

The first general objection applicable to all these leases is, that they do not purport to be made in pursuance of the leasing, or any other power in the settlement. Secondly, that they all are leases made in consideration of fines. There are other objections confined to each individually; two of them are reversionary leases, and two of them confer an extraordinary power of waste, and the third, in addition to this, contains a clause of surrender. There can be no doubt that the intention of the parties to the settlement of 1779 must be the rule of construction, and the court must collect the intention from all its provisions; *Landsdown v. Landsdown*.(a) It is material to consider the situation of the parties at the time of the execution of the settlement: Lady

Muskerry was seised in fee; Lord Muskerry had no [\*201] power over the estates, \*he was not even tenant by the curtesy, as there were outstanding leases for lives; what stipulation, therefore, was it reasonable for Lady Muskerry to make, when she gave her husband the power of charging for his own benefit to the amount of 20,000*l.*? We are not left to presumption, as the recital shows that the first object was to make a provision for Lady Muskerry, herself, and her children. The settlement, then, must be viewed as a contract, by which the wife, in consideration of a provision for herself and children, consents to give to the husband certain powers; that it must be considered in this light, and not as a mere voluntary settlement,

(a) 2 Bll. 68.

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is fully established by the case of *Scott v. Bell*.<sup>(a)</sup> Lady Muskerry stood in a situation, as competent to make a bargain, as the jointress did in that case. A court of equity recognizes a capability in the wife to contract with the husband, and, if so, Lady Muskerry must be considered as a party taking by contract and not by gift, and therefore in construing this power the court must be guided, as far as it is left to implication, by the relation in which Lord and Lady Muskerry stood as contracting parties. It is contended that this is a despotic leasing power, vested in Lord Muskerry, to take fines to any extent on making leases; but according to the true construction of the power, the words "with or without fines" are to be read in connection with the words "with or without covenants for renewal," and referred to the power to make leases with covenants for renewal, reading in a parenthesis from the words "covenants for renewal," \*down to the words "with or without fines." [\*202] *Doe v. Martin*,<sup>(b)</sup> where Lord Kenyon held that a court may introduce stops so as to give effect to the manifest intention of the parties.

This power must be construed so as to make it consistent with other provisions of the settlement; it was not the intention of the parties to give Lord Muskerry such an unlimited power as would enable him to defeat all the provisions of the settlement; they did not mean to confer upon him an indefinite power to dispose of the entire of the estate; they give him certainly a most liberal power, but still they confined him within certain limits. According to the construction of the leasing power contended for by the plaintiff, Lord Muskerry's power would have restricted him in making an original lease to do so, without a fine, but such lease might also have contained a covenant for renewal upon the payment of any fine on the fall of each life, and such new leases might likewise have contained covenants for renewal upon the payment of fines. This construction would have a very different effect upon the estate of the remainder man from that contended for by the lessees; by the

(a) 2 Lev. 70.

(b) 4 T. R. 65.



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latter, Lord Muskerry might have made a lease of the whole estate at a peppercorn rent, and received any fine for his own use; in fact, he would have had the estate in fee; but if he were restricted to the taking of fines upon renewals, the remainder man would have the benefit of the renewal fines from [\*203] \*time to time, as so much rent. It is said that the power of charging for younger children is indefinite, but that only amounts to a discretion to Lord Muskerry to benefit them in preference to an eldest son, without any personal advantage to himself, and is different from the unlimited power to dispose of the estate for his own use. Did the parties mean, when they limited the power of raising money to the sum of 20,000*l.*, that Lord Muskerry should have an unlimited power of taking fines to any extent? It is plain they contemplated that something should be left as a provision for Lady Muskerry and her children, and that the sons should enjoy some portion of the estate.

As to the objections applicable to the leases individually; two of these leases were made of premises of which there were outstanding leases for lives; the words in the power are, "lease or demise," which import present possession. *Doe v. Hiern*;(a) and in *Roe v. Prideaux*.(b) Lord Ellenborough says, that so long as a prior freehold lease is subsisting, a second freehold lease cannot be granted. It is insisted, however, that these leases may be sustained as concurrent leases; it appears by the last edition of the work on Powers,(c) in which the whole learning upon this subject is contained, that this doctrine is applicable to ecclesiastical leases only; the cases are traced back to that of *Reade v. Nash*, which is stated not to have been decided on that point, and although some observations on that case have been [\*204] made in \*the appendix to a late edition of Bridgeman's Reports,(d) it will be found, that the statement as to *Reade v. Nash*, not having decided this point is quite correct; and the case of *Fox v. Collier*(e) was decided expressly upon

(a) 5 Maule &amp; Sel. 45.

(c) p. 614

(e) Sug. Pow. 615.

(b) 10 East. 184.

(d) p. 605.

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the ground of its being an ecclesiastical lease. There is this mischief attending concurrent leases, if there be an entry by the second lessee, and he be evicted, the rent upon the second lease would be suspended, and an ejectment could not be maintained on the second lease, as there would be an outstanding prior legal title; nor could the landlord distrain; thus the remainder man is deprived of two most useful remedies for the rent.

In another of the leases there is a power to the tenant to graff and burn, and also a clause of surrender: the clause of surrender is in itself objectionable, it has been so decided by the Court of King's Bench in Ireland; *Doe v. Creed*.(a) Much more so when it is coupled with a clause permitting waste, so that tenant having reduced the land to a *caput mortuum* may throw it up. The burning of land has been denounced by the legislature as pernicious, and though it may not amount to waste, a clause authorizing even bad husbandry would be sufficient to vitiate the leases. *Taylor v. Horde*;(b) *Goodtitle v. Finucan*.(c)

It is sought to sustain these leases, on the authority of \* *Ward v. Hardpole*.(d) as an execution of the power [\*205] to raise money by sale or mortgage: that case, however, is distinguishable from the present, as there there was a general power to raise money, but here the parties are expressly limited to the raising of money by sale or mortgage, which modes are not so inconvenient to the remainder man, whereas, if the money be raised by means of leases, the estate can never be discharged of the incumbrance.

Mr. Warren, Mr. O'Loughlen and Mr. Collins for the representatives of Roger Sheehy the younger, the lessee in the lease of the 28th of October, 1779.

It would have been open to Lord Muskerry to defeat the alleged objects of the settlement, even upon the construction

(a) 2 Hud. &amp; B. 128.

(c) Doug. 544.

(b) 1 Burr. 60.

(d) 3 Bli. 470.

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contended for upon the other side, as it is admitted that under the power he might have made a lease for any term and at any rent, and therefore a lease at a nominal rent to a trustee for himself; *Talbot v. Tipper*; (a) or he might have made a lease for a year, and upon the expiration of the term have granted a renewal, taking a fine to any amount. The power provides for four distinct objects, first, to lease for any term of lives or years; secondly, to do so with or without covenants for renewal; and, thirdly, in case of the determination of such leases to make new or other leases, and, fourthly, to make any lease with or without fine. In the case of *Doe v. Martin* (b) Lord Kenyon [\*206] said that the words of limitation might be referred to all the preceding members of the sentence, and according to the grammatical construction, the words "with or without fines," in this case, may be referred not only to the last antecedent, but to the whole of the preceding sentence, and therefore it was competent to Lord Muskerry to take a fine as well on an original lease as on a renewal.

It has been said that the taking of fines is an inconvenient mode of raising money; so far from being so, it might be beneficial, as the rent would be better secured and the tenure preserved. There is another leasing power in the settlement which shows, that where the parties intended to restrict the power, they knew well what expressions to use, and they also knew how to prevent the donee of the power from taking a fine. It is not attempted to be said that the rent and fines were not the full value of the lands demised. If the construction for which the lessees contend be adopted, no party will be injured, as but little more than 20,000*l.* was raised; but if the court adopt the other construction, the *bona fide* tenant will be deprived of his property, upon which he has expended large sums, and that too upon the construction of a most doubtful clause. *Roger's Case* (c) and *Whitlock's Case* (d) establish, that it is unnecessary to refer to the power where the object could not be effectuated by any other

(a) Skin. 427.

(c) 1 Ventr. 228.

(b) 4th T. R.

(d) 8 Rep. 63, b.

means but an execution of the power, and it is no matter whether the \*party intended to execute the power [\*207] or not, he must make his act as good as his interest will enable him to do; *Blake v. Marnell*.<sup>(a)</sup> Then as to the clause permitting waste, it can be no objection where there is such a general unrestricted power to make leases for any period of time, for 1,000 years, or even for lives renewable forever. Besides, many persons think that the burning of lands is not bad husbandry; the Act of Parliament merely gives to the landlord a power of recovering penalties if he should deem it injurious, but there is nothing in it to prevent the landlord from giving his tenant permission to burn the soil. With respect to the clause of surrender, the court of King's Bench certainly held, in *Doe v. Creed*,<sup>(b)</sup> that such a clause, under the particular circumstances of that case, invalidated the lease, but it would be carrying the doctrine much further to say, that if a tenant gives 2,000*l.* for a lease, on which comparatively a small rent is reserved, he should not be permitted to give that back to his landlord.

There is a decree of the Court of Exchequer for a sale of the premises subject to these leases, and if the validity of the leases is to be disputed, it cannot be done in this court as long as the decree in the Court of Exchequer remains unimpeached.

[The *Lord Chancellor* here observed, that his attention \*had been withdrawn from the facts of the case, [\*208] from the time it was stated a compromise had been entered into; and as the bill had been filed to impeach the mortgages and the sale, and as the Chinnerys and Lord Muskerry had come to an agreement, by which they withdrew from the consideration of the court the question as to the validity or invalidity of the sale, he did not think he had jurisdiction to decide upon the validity of the leases, and that he was now placed in a different situation from what he would have been, if the proceedings had been continued against all the parties, and ex-

(a) 2 Ball & Bea. 35, affirmed 4 Dow. 248.

(b) 2 Hud. & Bea. 128.

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pressed a wish (when the argument upon the leasing power should be finished) to hear a counsel upon each side, upon the question, whether in the then state of the pleadings he could decide upon the validity of the leases.]

At the time of the settlement the estate was subject to Godley's mortgage of 7,000*l.*, and to the annuity of 1,083*l.*, and it is stated in the bill that its value was only 1,400*l.* a year, exclusive of the demesne. Lord Muskerry had a power to raise 20,000*l.*, and an unlimited power to charge for younger children; these charges would more than exhaust the whole estate; it cannot be supposed, therefore, that it was intended the remainder man should take any beneficial interest.

The words in the power to raise 20,000*l.* are "to raise and levy by one or more sales or mortgages any sum of money not exceeding 20,000*l.*, or to charge the premises therewith;" [\*209] these words would authorize the raising of \*money by taking fines upon leases. *Ward v. Hardpole*.(a) The sum raised by the fines and the mortgages scarcely exceeded, in the whole, the sum which Lord Muskerry had power to raise, and the mortgages being made subject to the leases, it is plain that the parties, when taking the fines, had in their contemplation the execution of the power to charge 20,000*l.*

Mr. *Richards*, for the representatives of Roger Sheehy the elder, the lessee in the lease of the 4th June, 1780, contended that the objection to this lease, on the ground of its being a concurrent lease, was not tenable, and cited *Fox v. Collier* ;(b) *Reade v. Nashe* ;(c) *Doe v. Calvert* ;(d) *Doe v. Hiern* ;(e) *Coventry v. Coventry* .(g)

Mr. *Lefroy* in reply.

(a) 3 Bli. 470.

(b) And. 65, S. C.; Moore, 107, S. C.; Douglas, 597.

(c) 1 Leo. 147.

(e) 5 Maule & Sel. 40.

(d) 2 East, 376.

(g) 1 Com. 312.

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It has been stated that the construction contended for by the plaintiff would also enable the tenant for life to defeat the objects of the settlement, by making a lease to a trustee for himself at a nominal rent, but such a lease could never be sustained in a court of equity, as a fair execution of the power. *Talbot v. Tipper*(a) was the case of a voluntary settlement, and there the party on the face of the instrument marked an intention to reserve the utmost \*latitude of power over his [\*210] own estate; but the settlement in this case must be construed as a contract, where the intention of all the parties is to be the guide. As to the second point, whether the leases can be sustained under the power to charge, the case of *Ward v. Hardpole* has been relied on: that case does not decide the point; there there was a general power to raise any sum of money, and Lord Mansfield only expressed an opinion (for the leases were set aside upon other grounds) that the leases might be sustained under the power to raise money; at all events that case is no authority for saying they can be sustained by the joint operation of two powers. A power to raise money by sale or mortgage can never authorize the taking of fines upon leases, as long as a sale, mortgage, and lease are three distinct things.

Mr. *Lefroy*, for the plaintiffs, upon the question reserved.

12th February.—Notwithstanding the arrangement with the Chinnerys, the plaintiff is entitled to impeach the leases. There was no compromise with the Chinnerys until the hearing, and up to that period the tenants had the full benefit of the defence made by the Chinnerys upon the record, and of the examination of witnesses; the compromise only settles the amount of what is due to the Chinnerys. This point is quite a surprise upon the parties. If the plaintiff had thought that by this compromise he would be prevented from disputing the leases, he never would have entered into it. The mortgagees took expressly subject to the leases, by which the remainder man's right to dis-

(a) Skin. 427.

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[\*211] pute \*their validity was reserved. He might have impeached them in a separate bill, and the circumstance of joining the lessees in the same suit does not prejudice his right against them. The case must be decided as it stands upon the record, upon which this incidental matter does not appear, the court, therefore, can take no notice of it. The Chinnerys are still before the court upon the record; they have not been struck out. If the court had disposed of that part of the case relating to the Chinnerys, it would not have embarrassed the discussion between the plaintiff and the lessees. What difference can it make if instead of getting relief from the court we get it from the acts of the parties? The transaction as to the compromise is not before the court, and is matter to be taken advantage of by the lessees by supplemental bill only.

Mr. O'Loghlen, *contra*.

The court is called upon, in the absence of the Chinnerys, to pronounce upon the validity of the leases; we have a right to treat the case now as if the Chinnerys were out of court; the sale under the decree in the Exchequer must be considered a valid sale, there being no order to set it aside. And the question then is, when an estate, in settlement, is sold subject to leases, can the remainder man file a bill to impeach them without bringing the purchaser before the court, who would have a right to be heard, and who might object to have one tenant substituted for another—a person who may be insolvent for

[\*212] \*one who is solvent, and with whom the purchaser is satisfied? The solvency of the tenant may have been the inducement to the purchaser to make the purchase; everything may depend on the solvency of the tenant, as in the case of a brewery. Can it be said that the lessees would continue personally liable upon the covenants in their leases, after a decree setting them aside, or could the purchaser then maintain any action of covenant against them? The Chinnerys might also complain of surprise, and say, that if they had known the leases were to be impeached, they would not have entered into the

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compromise. The bill can be defended from multifariousness only on the ground that the plaintiff seeks to impeach the leases through the Chinnerys, and as they are withdrawn the bill cannot be sustained. The leases at all events should not be set aside for the benefit of Lord Muskerry; there was a deficient fund for the payment of the creditors, and if the estate had been sold discharged of the leases it would have brought a higher price, which would have gone to discharge the incumbrances; and it is not right that the remainder man should put this money into his pocket.

THE LORD CHANCELLOR:—In this case I have had the able assistance of the Lord Chief Justice of the Common Pleas and the Lord Chief Baron, and of course I should have asked them to favor myself and the bar by pronouncing their opinions in court, if the case had not taken a very unexpected turn, which rendered it, in my view, unnecessary to decide [\*213] the legal question. The bill was originally filed against the Chinnerys and against the lessees, impeaching both the sale of the inheritance and the leases, and praying that the leases might be declared void as an undue execution of the power, and that the sale might be declared fraudulent and void, and that Lord Muskerry might be declared entitled to the possession. I do not agree with the argument that there was anything multifarious in that bill; as the pleadings originally stood, the plaintiff was entitled to seek the relief he did. When the case was before me a few days ago, sitting alone, after all the facts had been stated, the counsel for the plaintiff interposed, stating that an arrangement had been entered into with the Chinnerys, and stopped the further progress of the cause as against the Chinnerys; of course I did not interfere with that arrangement. It was then suggested that there was but one point to be argued, namely, the question as to the legal validity of the leases, and that that point had been submitted to the Court of Common Pleas for their opinion, and they decided that these leases were void, as an invalid execution of the power, and therefore that I had nothing further to do with this cause, but to decide the ques-



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tion upon their certificate as I might agree with it or not. For this purpose I asked for the assistance of the Lord Chief Justice and the Lord Chief Baron, and I hoped to be able to decide the equitable and legal question without putting the parties to great expense and further delay, by sending this case to another court.

It occurred to me, in the course of the hearing before [\*214] myself and the learned \*judges, to ask, who were the parties conducting the argument? I took it for granted that the Chinnerys were represented upon this point, but it was stated that the lessees' representatives only were then before the court. It struck me at once that the position of the case was altered, and I felt considerable doubt whether it was possible to give any relief against the lessees, while the sale to the Chinnerys was unimpeached. However, I allowed the argument to go on, and I then desired that one counsel on each side should argue that point before me alone. I have therefore had the entire case before me. The question as it now stands is this, can Lord Muskerry impeach these leases in the absence of the Chinnerys? It is contended that the compromise with the Chinnerys does not affect the question as to the leases. The Chinnerys were properly here, but they have been withdrawn from the jurisdiction of the court. The consideration has been withdrawn from me of the point, whether the sale to the Chinnerys was impeachable or not. I have had no means of forming an opinion upon that question, therefore I cannot say that the sale can be impeached, and the mode in which the case has been argued shows the difficulty in which the court is placed.

A settlement was executed in the year 1779, containing very peculiar leasing powers, and under those powers leases, for which very large considerations were paid, were immediately granted for very long terms of years, amounting to perpetuities, under which the tenants have enjoyed up to this time.

[\*215] In a former suit instituted by a prior \*incumbrancer, the court set aside, or rather removed, these leases out of the way of the prior incumbrancer, to the extent of his incumbrance, but the court very properly gave the lessees a right

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to stand in the place of the incumbrancer, so far as by rack rents they should pay off any part of that incumbrance. It was a right, therefore, not given to persons claiming under the settlement, but to a person claiming paramount to the settlement. It is, however, a powerful circumstance in the case that there was a suit in which these leases were partially set aside or removed. The attention of everybody must have been drawn to them, and therefore, after fifty years' possession, and after great expenditure by the lessees, I cannot now allow these leases to be impeached, except upon very strong grounds. There were two powers in the settlement, the power of leasing, and the power of mortgaging or a power of raising 20,000*l.* by sale or mortgage. The tenant for life did execute the latter power to the extent of 10,500*l.* A bill was filed in the Court of Exchequer, and the estates were decreed to be sold in the year 1807, and there was a sale accordingly by the court, under a decree regularly made, with all the parties before the court. The mortgages, which were created under the second power, were made expressly subject to the leases under the first power, and when the estates were sold by the Court of Exchequer, they were sold openly subject to those leases. I must therefore consider that at that period the court itself considered the estates as properly bound by these leases. Now, in the first place, if a man buy an \*estate [\*216] subject to an incumbrance, and it turns out that it is not a valid incumbrance, yet he may buy so subject to it as not to leave him the power to impeach it. The cases go to that extent. Lord Muskerry was tenant in tail under the settlement, and I must consider him now to have filed a bill against the lessees, upon the ground that these leases were not a valid execution of the power, and that they ought to be set aside for his benefit; and as the matter now comes before me, I am asked to give that relief in a cause where the Chinnerys are not substantially before the court for the purposes of this question. The case of *Maguire v Armstrong*(a) may be considered as an authority for this equity. A. supposing an estate devised to him in

(a) 2 Ball & Bea. 538.

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fee on failure of issue of B., living at the time of his death, had been barred by a recovery suffered by B., joined him in a conveyance to a purchaser of the estate subject to certain leases made by B. B. having died without issue living at his death, the plaintiff, the purchaser, called for a further assurance. Whether he wanted it may be made a question, for if a man devise to one in fee, with an executory devise over to another, it may be thought that a release and conveyance by both of them would carry the absolute fee simple. But I am not called upon to decide this point. The defendant brought ejectments, and offered not to disturb the purchaser if he joined in impeaching the leases granted by B., but if the legal fee in all [\*217] events passed to the purchaser, A. had no \*title to maintain those ejectments. There was an original and a cross bill filed, and they came on to be heard before Lord Manners, who permitted the devisee over to impeach the leases, on securing the rents to the purchaser, and said that there was a case where the purchaser broke the leases subsisting at the time of the sale, and he was decreed to be a trustee for the vendor. Where that case is I do not know; I never met with such a case; I should be of opinion, but for the authority of this case, that there was no such equity. The devisee over having joined in the conveyance, the fee passed against the executory devisee over, at least in equity; and if, as it might be held, at law also, there was no ground for bringing an ejectment. Now as to the equity: if I buy an estate subject to an existing lease, and the estate is conveyed to me subject to that lease, suppose I see on the face of the lease that the tenant has given a considerable fine, and therefore I consider the rent to be amply secured (for the greater the price given for the lease the better secured is the rent, and the greater is the inducement to the purchaser), and I approve of the man himself as a solvent tenant, am I to be told as a purchaser, that the seller is to interfere with my property, and say to me, "you may be content: if I set aside the lease it cannot affect you?" but I should answer, "I have the benefit of a solvent tenant and I desire the lease may remain undisturbed." How is the seller to set aside the lease? What becomes of the cove-

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nants of the original lease? Suppose a covenant against alienation, what is to become of it? Is he himself to be the lessee? \*The covenants of the seller may not be worth [\*218] anything, and the value of the property may depend, as in the case of a brewery, put by Mr. O'Loughlen, upon the capital and skill of the individual tenant. I cannot understand this equity, in the absence of fraud. The seller should impeach the leases if he mean to do so, before the sale. After the conveyance is executed, the seller ought not to be permitted to affect the relation between the tenant and his new landlord. Many cases may occur in which a man would not attempt to impeach a lease whilst he was owner of the estate, and yet would promptly do so if he were allowed, after he had sold the estate to another. The very litigation might unsettle and ruin the tenant, and yet after all prove unsuccessful. In *Taylor v. Sibbert*(a) the court did countenance this doctrine. There a tenant for life had granted leases with covenants for renewal not authorized by the power in the settlement, and he and his son, tenant for life in remainder, afterwards concurred with the trustees in the settlement, for the sale of the fee under a power in the settlement subject to the leases, and Lord Rosslyn compelled the purchaser to grant renewals, although the leases were void against one of the sellers under whom he claimed, and also against the tenants in tail under the settlement. I do not touch a case of this sort—a void lease by a tenant for life under a power, at an inadequate rent, and then a sale of the estate, under a power of sale in the same settlement, at a price in proportion to the rent reserved; in such a case there is nothing \*to affect [\*219] the right of the remainder man to set aside not only the lease but the sale. The purchaser knew that there were leases and ought to have ascertained the terms of them, and not to have paid his money for the estate without doing so. I can hardly conceive so strong a case as the present. A man with his eyes open sells an estate subject to a lease, and after that seeks to be allowed to disturb the lease, although the purchaser

(a) 2 Vea. Jan. 437.

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himself desires that it should not be broken. There is in my opinion no equity in a person so circumstanced to file a bill against the lessees, unless he can impeach both the sale and the lease. If the purchaser has improperly got the reversion, and having the legal title can alone maintain an ejectment, the seller would have a right to mix both of the cases together, and impeach at the same time both the sale and the lease.

It would be very difficult to persuade me that there is an equity as against the lessee where a man has been in possession for half a century, where he has advanced considerable sums of money, and been at great expenditure, and where there has been no fraud. It is simply a question at law whether the lease is good or not; and you have no right in a court of equity to impeach a lease that is good at law, unless you show that you have a right to come here for equitable relief upon other grounds. Now that the Chinnerys have withdrawn from this suit, I am left without any jurisdiction to impeach these leases in their absence. Who has a right to complain if the property [\*220] was sold for less than it might have brought?

Why, the creditors who were not paid. I cannot impeach these leases unless the parties are before the court who have a right to impeach them; I cannot allow a remainder man to run away with the money of the creditors; it is impossible in the absence of the landlord to impeach these leases; you have not got him here; and you yourself have prevented him from being here. His rights must be affected by a decree in your favor. I cannot therefore in his absence decide this question against the lessees.

But as this is a case of considerable anxiety to both parties, I am not indisposed to state what my impression was upon the arguments upon the main question, as I take it for granted that both sides are desirous to have my opinion, and the opinion of the learned judges who sat with me. I very early entertained an impression that the case was not satisfactorily decided in the Court of Common Pleas. My own impression was that these

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were valid leases. The settlement is rather a singular one. Lady Muskerry was seised in fee at the time of the settlement. There are no recitals, but the parties proceed at once to settle the estates. [His Lordship here read the limitations of the settlement.] You never can travel out of such an instrument. It was not in the usual course that the reversion in fee of the wife's estate should be given to the husband after the common purposes of the settlement were exhausted; why was it not left in her? But you must act upon the settlement as the parties thought fit to frame it. \*I make this observation, because it was [\*221] strongly pressed upon the court that this was not a voluntary settlement, but a contract which the court was bound to execute, and the case of *Scot v. Bell*(a) was cited, but that case and the present appear to me to depend upon different grounds. There a person having a right under an existing settlement, was called upon to join in a new settlement. The junction of that person was considered as essential. The question there was simply this, was there value given by the person called upon to join? but that does not touch the case before the court. Is there on the face of this settlement, such a contract, as ought to require a construction of the power different from what it would receive in any other settlement? This was a settlement of the wife's estate; suppose Lord Muskerry a month afterwards, for a purely voluntary consideration, to have made a similar settlement of his own estate, could I put one construction upon that and another upon this? I am clearly of opinion that I could not: though I may look at the situation of the parties, and collect from that what their intention was, in order to enable me to understand the sense in which they use expressions; yet I cannot do so in order to put a construction upon words not warranted by their own force. *Landsdown v. Landsdown* contains simply a dictum with which I find no fault. The question is not whether this was a settlement for valuable consideration, but I have no doubt that it was, though made after the marriage. I think there can be \*no such thing as a voluntary settlement of the wife's estate, the property passing

(a) 2 Lev. 70.

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out of both husband and wife, neither could convey without the concurrence of the other; but whether voluntary or not, I am to consider the construction of the power. It authorizes Lord Muskerry to lease for any time or term of years or lives, and with or without covenants for renewal, and in case of the determination of all or any of the aforesaid lease or leases respectively from time to time, to make new or other leases thereof in manner aforesaid, and with or without fines. Now the first question is, what is the construction of the words, simply understood? Whether the court is to restrain or cut them down is another question. The counsel on both sides elected to consider the case as if the clause had contained the word "and"; but then it was contended by Mr. *Lefroy*, as I understood, that the words "with or without fines" did not authorize the receiving of any fines, except upon renewals under covenants in prior leases, granted under the power; and being driven to it by the court, he stated very fully and fairly what he considered the power would authorize, namely, that Lord Muskerry had a right to make leases for any term of lives or years, at any rent he thought fit, and with or without covenants for perpetual renewal, either at a peppercorn fine or for value, and that he might renew upon taking fines if authorized by such covenants for renewal; now that could not be unless the words "with or without fines" were limited to the renewals, and it was therefore proposed to carry the words "and with or without any fines," back to that clause which ends "and with or without [\*223] covenants \*for renewal." Lord Kenyon, in the case referred to, lays down the principle, that though instruments are not pointed or stopped, yet courts of justice will stop and punctuate them, in order to give to the words their proper import. If I adopt the construction of Mr. *Lefroy* it will read thus: "To lease or demise for any term of lives or years with or without covenants for renewal," "and with or without fines." Now, I have no doubt whatever that the tenant for life could take a fine, either upon an original lease or upon the renewal of a lease; for the words are emphatic. It is a power to grant leases "with or without fines," and with or without covenants

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for renewal, and the more you try to take from the words their natural import, the more difficult and complicated you make the case. I cannot think that it is the office of a court of justice, by a subtle construction, to cut down the general words of such a power as this, in order to impeach a transaction which has been so long acquiesced in, and upon the faith of which thousands have been expended by the lessees. I think that those who give such powers should take care to limit them distinctly, and not send them forth in a shape which may make them instruments of evil against innocent persons. I am decidedly of opinion that the general terms of this power authorize the taking of a fine upon any lease, whether an original lease or the renewal of a lease, and whether granted under a covenant for renewal or not, and that I have no authority to restrict them. I am authorized by the Lord Chief Baron to state that he entirely concurs with me in that construction; and I am justified in stating, on the part of the Lord Chief Justice of the Common Pleas, \*who was placed in rather an embarrassing situation, [\*224] that the arguments in this court have made a strong impression on his mind. Now the next power in the settlement bears most powerfully upon that conclusion. Supposing the power to be general, have I a right to curtail the effect of it? Although there are those general words, may I limit and restrain them by construction? The power is to charge and incumber all the said estates with any sum or sums for the younger children of the marriage in such proportions and manner, and payable at such times, as Sir Robert should by deed or will appoint. Then there is a power to Sir Robert to "raise or levy by sale or mortgage any sum or sums of money not exceeding 20,000*l.*, or to charge the premises therewith for such uses as he should by deed or will appoint." Here, after a strict settlement, is a power to the tenant for life to grant any leases he may think proper, not limited as to time nor as to the rent, and he may grant such leases with or without fines. Next there is a general power to provide for younger children, and then there is a power by sale or mortgage to raise 20,000*l.* Now before the parties entered into this transaction, there were two children in existence, and



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it occurred to the framers of this deed that those children should have some power to make leases, and accordingly, by an indorsement on the deed, a power is limited to them to make leases for three lives or thirty-one years at the best improved yearly rent, and that no fine or other consideration should be taken by them. This is a short and simple form. When, therefore, they meant to put a restraint and impose a restriction upon the exercise of the power, no men knew better how to execute their purpose. What then is the construction of these different powers? As regards the power of leasing, the case of *Talbot v. Tipper*(a) bears very powerfully upon this case. There the power was to make leases with fine or without fine, and rendering such rents and services as the donee of the power should think fit. The settlor declared the uses of the term, to secure the payment of his debts; and afterwards made a lease without reserving rent. It was argued that, by a rational construction of the words, some rent must be reserved, to which the court made this answer—"It being to reserve such rent as he should think fit, and he having thought fit to reserve no rent, this shall not avoid the execution of the power," for a peppercorn reserved, payable forty years after, had been sufficient. The power was held to be an unlimited one. I must say that I think courts of law and equity have very often been mispending their time in seeking to introduce qualifications where parties have used general expressions, and not taken the trouble to explain the intention to use them in a restricted sense. If I am to restrain this power at all, will anybody point out how far I am to restrain it? Where is the limit to be? The term may be ten thousand years and the rent may be a peppercorn, and where is the line to be drawn as to the amount of the fine? I see none. I think there is no power in this court to cut down this power. There is nothing to guide me except what appears on the face of the instrument, and therefore I am of opinion that this general leasing power must, both at law and in equity, have its full force and operation. Now as to

(a) Skin. 427.

the next power, to charge for younger children any sum he should think fit; that also is without limit: the settlement gives the father a power to appoint any sum. In the case of *Long v. Long*(a) the very point was decided. There, under such a power the father thought fit to direct the entire estate to be sold, and he gave nearly the whole of the produce of it to the younger children. It was argued that this never could have been the intention of the parties, because if the father was allowed to dispose of the whole it would defeat the settlement, but Lord Rosslyn stopped the counsel and asked, what could be said upon that point? Where is the limit here? If the parties themselves have not limited the amount, is this court to be called on to do so for them? How am I, sitting as a judge in a court of equity, to arrive at any just conclusion as to what the proper limit should be, where the parties themselves have left it at large? The effect of the two cases to which I have referred is, that these powers cannot be restrained; then supposing that they cannot be restrained, the question is, are there any equitable rights? This question was raised in the course of the discussion, whether or not the father had a right to raise the 20,000*l.* besides the fines, or whether the fines should be taken as a portion of the 20,000*l.*; I am not called upon to decide that point; but

\*I am not at all certain that the court might not con- [\*227]  
sider that there would be no incongruity in holding, that the fines should be taken to be in aid of the power to charge the 20,000*l.* In the case of *Blake v. Marnell*, which was first in this court,(b) and afterwards in the House of Lords,(c) it was decided, that under a power of raising a certain sum of money you may limit an annuity or rent charge, and the House of Lords considering it an equitable execution of the power relieved against the defect. I do not see the difference between raising the charge by mortgage and by such an annuity, which was really only a postponed mortgage securing the payment by annual instalments. Why was it not good at law? No damage can be done provided the amount of the charge be not exceeded. The case of

(a) 5 Ves. 445.

(b) 2 B. &amp; B. 35.

(c) 4 Dow. 248.

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*Ward v. Hartpole*,<sup>(a)</sup> which has been so much discussed at the bar, was a very singular case; the power there was to grant leases for any number of years, or for one, two or three lives certain, or renewable forever at the best improved rent without fine. There was also another power enabling the tenant for life, with the consent of the trustees, to raise any sum or sums of money. He did grant a lease upon a fine, and therefore that could not have been at the best improved rent, because a fine was received, and it was not considered good under the first power, but was held to be a good execution of the power to raise any sum of money. This case shows the extent to [\*228] which courts have gone in order \*to sustain fair transactions like these; and the doctrine of Lord Mansfield in that case agrees with the decisions in *Talbot v. Tipper* and *Long v. Long*. It appears to me that it is impossible to defeat these leases at law, and if they cannot be defeated at law, it is quite clear, in my apprehension, that they cannot be impeached in equity. They were granted for valuable consideration openly paid. They have been acquiesced in for nearly half a century. They have heretofore been made the subject of consideration by courts of justice. They have been partially set aside as against prior incumbrancers. The estate has been sold under a decree subject to these leases, and in my judgment they cannot now be impeached in a court of equity. I think it quite clear that lessees under a power, if evicted at law, are entitled under the usual qualification to be relieved in equity against the defective execution of the power, where the defect is not matter of substance. *Campbell v. Leech*,<sup>(a)</sup> is the leading authority on that head.

There were some minor objections upon which I must observe. It was contended that these were, in effect, reversionary leases, but I think that the point does not arise under the ample terms of this power. It was then said that the power to commit waste invalidated the leases. I am clearly of opinion, and the Lord

(c) 3 Bli. 470.

(a) Amb. 740.

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Chief Baron, and I believe the Lord Chief Justice of the Common Pleas, agree with me in thinking, that in a power of this nature, \*that cannot be any objection to the validity of [\*229] the leases, because the power is unlimited.

It is said also that there is a clause of surrender; I am aware of what has been decided in this country upon that point, but I am bound to say that my opinion does not agree with those decisions on the abstract question, that a clause of surrender invalidates a lease. I think not, unless you put in express words to exclude it. During the fluctuations of prices, many cases must occur in which a solvent tenant cannot be obtained without a clause of surrender. Insolvent tenants are not very particular as to the continuance of the term. Where the transaction is *bona fide*, and the terms of the power do not require the number of years to be absolute, I see no reason for holding that a clause of surrender vitiates the lease. Many powers do require that the term to be granted shall be an absolute one, that is, not determinable, and this is a powerful reason for not introducing the term into a power where the parties themselves have been silent. In this case the objection is entitled to very little weight, as the lessees have paid a large consideration; and with reference to the terms of the power, it is entitled to no weight whatever. These I think were all the objections of importance. There was another made at the close of the argument, which in an ordinary case would have been entitled to attention: that the lands of Gortaheedy were not specified in the settlement, that they were included in one of the leases of part of the settled estate, and that one entire rent was reserved, and therefore that lease was void upon \*this ground. There is, in my opinion, con- [\*230] siderable force in that objection, and in an ordinary case, that is, if the power of leasing were the common one, it would be entitled to great weight. But the objection, here, amounts only to an inconvenience, and it is not irremediable; and if the lessee were evicted at law to-morrow, we all know that upon such an eviction there would be an apportionment of the rent at law, in favor of the person entitled under the settlement. This there-

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fore is not an objection impeaching the lease. After the great assistance I have had, and after the able arguments of counsel, and after the attention I have given to this case under the peculiar circumstances, I have hazarded somewhat in going out of my way to review the whole of this case, but I have thought it my duty to do so, in order, if possible, to prevent further litigation between the parties. I decide this case upon the first ground; but I am bound to say, that if that point had not existed, I should have decided it upon the other grounds which I have mentioned, and the Lord Chief Baron has authorized me to say, that he coincides with me in opinion upon all the points. I dismiss the bill as against the representatives of the lessees, with costs.

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By the decree as made up and enrolled, after reciting that the plaintiff, by his counsel in open court, had waived insisting on any relief as sought by his bill, in respect of the said final decree pronounced by the Court of Exchequer, and the said sale in pursuance thereof, and that it had appeared that under [\*281] \*the said decree in the Court of Exchequer the said lands were sold to the purchaser, Alice Chinnery, subject to said indentures of lease of the 28th October, 1779, and 4th June, 1780, it was ordered that the plaintiff's bill should be dismissed with costs as against the defendants, the representatives of the lessees of the leases of the 28th of October, 1779, and 4th June, 1780 (the lessees who appeared at the hearing), save as to the costs incurred in respect of the said proceedings in the Court of Common Pleas, as to which, it was declared that all parties should abide their own costs.(a)

\*(a) The decree in this case was reversed, upon rehearing, by Lord Plunket, on the 11th June, 1835.

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## ALEN v. HOGAN.

1835: 12th February.

By a deed of compromise between U. W. A. and L. A., the former conveyed a certain fee simple estate to a trustee, "charged and chargeable with all leases, mortgages, gifts, conveyances, judgments and incumbrances, theretofore made by him of all or any part of the said estate," upon trust to permit him, U. W. A., during his life to receive the rents, and after his decease to convey the said estate to L. A. and his heirs. Previous to the execution of this deed, U. W. A. had confessed several judgments, and mortgaged the whole estate. U. W. A. afterwards died, leaving considerable personal property. Held—that the real estate so conveyed by him, was the primary fund for the payment of those incumbrances.

In the year 1727 Matthew Alen, being seised in fee simple and fee tail of considerable real estates, died intestate and without issue, leaving three brothers, Anthony, Michael and Luke, who all professed the Roman Catholic religion, and therefore, upon the decease of Matthew, the said estates descended in gavel to the said Anthony, Michael and Luke, under the statutes of 2 An. c. 6, s. 10, and 8 An. c. 3, s. 9, then in force in Ireland.

\*Anthony, who was then of age, entered into pos- [\*232]  
session of the whole of the estates, and sent his younger  
brothers, Michael and Luke, to be educated in France, from  
whence they never returned to this country. In 1754 Anthony  
died intestate, leaving Ulick Wall Alen, his only son and heir  
at law, who thereupon became entitled, in right of his father, to  
one third of the said lands; he, however, entered into the pos-  
session of the whole of the estates, and continued to receive the  
entire of the rents, but occasionally remitted sums of money to  
his uncles, the said Michael and Luke, on account of their res-  
pective shares. Some time afterwards Michael Alen died intes-  
tate and without issue, and upon his decease his one third also  
descended in gavel between his nephew the said Ulick Wall  
Alen, and his brother the said Luke Alen, so that each of them  
then became entitled to a moiety of the said estates. In 1787  
Luke Alen died intestate, leaving the plaintiff, Luke Alen, his

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only son and heir at law, then a minor, and who, therefore, in right of his father, became entitled to one moiety of the said lands.

In 1821, the plaintiff, Luke Alen, having come to reside in Ireland, filed a bill in this court against Ulick Wall Alen, praying that he might be decreed entitled to one moiety of the lands, and be put into possession thereof, and also for a partition.

The cause was heard in December, 1826, and the bill was retained, with liberty to the plaintiff to try his title at law; [\*233] an ejectment was accordingly brought, but, on the \*trial, the jury did not agree, and there was no verdict. A compromise was then proposed, which was carried into effect by the following instrument.

By indenture of compromise, bearing date the 18th of September, 1827, and made between the said Ulick Wall Alen of the first part, the said Luke Alen of the second part, and Bryan Cogan (a trustee) of the third part, after reciting the filing of the said bill in 1821 by Luke Alen against Ulick Wall Alen, and the proceedings thereon, and the said trial at law, the said deed proceeded in these words: "And whereas, the said Ulick Wall Alen and Luke Alen, in order to avoid further costs and expenses, and to put an end to the said suit and litigation between them, have mutually agreed to settle and finally end the said matters and suits amicably, and the said Luke Alen hereby agrees to dismiss the said bill, and to sign any consent that may be necessary for that purpose; and the said Luke Alen and Ulick Wall Alen do each reciprocally agree to abide and pay their own costs of said equity suit and ejectment;" the said Ulick Wall Alen, in consideration of the premises aforesaid conveyed unto the said Bryan Cogan, his heirs and assigns, the said lands before mentioned, "subject to, and charged and chargeable with all leases, deeds, demises, mortgages, gifts, grants, conveyances, judgments, assignments, and incumbrances, as have been heretofore made and executed by the said Ulick Wall Alen, of all and every or

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any part of the aforesaid towns, lands, and hereditaments, \*and also subject to and charged and chargeable [\*234] with all judgments confessed by or entered against the said Ulick Wall Alen, which are now due or unpaid," upon trust in the first place to permit and suffer the said Ulick Wall Alen and his assigns, during his life, to receive and take the rents, issues, and profits of the said lands, and after his decease then "in trust to convey all the aforesaid premises to the use of him the said Luke Alen, his heirs and assigns forever, but subject nevertheless to all leases, deeds, demises, mortgages, gifts, grants, conveyances, incumbrances, assignments, and annuities, heretofore made and executed by the said Ulick Wall Alen of the said lands and premises, and subject also to all judgments confessed by or entered against the said Ulick Wall Alen, and which are now due or unpaid." And the said Luke Alen, for and in consideration of the premises aforesaid, did for himself, his heirs, executors, administrators and assigns, forever release and discharge the said Ulick Wall Alen, his heirs, executors, administrators and assigns, of and from all claims and demands under or by virtue of the said Luke Alen's marriage settlement or otherwise, for or on account of the mesne rates and all other demands touching or concerning the said lands and premises, and the rents, issues and profits thereof, and also of and from all costs and expenses of all suit and suits at law and in equity, which had been theretofore incurred or occasioned by reason of the proceedings thereinbefore mentioned, at the suit of the said Luke Alen against the said Ulick W. Alen. And the said Luke \*Alen also agreed, at his own costs and charges, to dis- [\*235] miss and make void the said bill so filed by him in the said Court of Chancery against Ulick Wall Alen, and the other proceedings by him instituted against the said Ulick Wall Alen, touching or concerning the said lands. And the said Luke Alen did thereby "ratify, allow, and confirm all and every lease, demise, deed, and deeds, or other instrument, heretofore made, done, or executed by the said Ulick Wall Alen, touching and concerning the aforesaid lands and premises, and each and every of them, and each and every part thereof."



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Ulick Wall Alen had, some time previous to the execution of this deed, confessed several judgments, and he had also, by a deed, dated the 1st June, 1786, mortgaged the whole of the lands to secure a sum of 8,600*l*.

On the 29th March, 1829, Ulick Wall Alen died unmarried and without issue, possessed of a considerable personal estate, having by his will, made in the year 1822, bequeathed the greater part of his personal fortune to the defendant, M. A. Leonard, an infant.

The present bill was filed by Luke Alen against the defendant, Hogan, the personal representative of the said Ulick Wall Alen, and the said M. A. Leonard, and the other legatees named in the will of the said Ulick Wall Alen, praying that the mortgage debt of 1st June, 1786, and all judgment debts, annuities, and other incumbrances \*due or created by the said Ulick Wall Alen, and affecting the said estates or any part thereof, and all sums due thereon respectively, for principal, interest and costs, might be discharged out of the personal assets of the said Ulick Wall Alen, and for that purpose that the usual account might be taken of all sums due on foot of the said incumbrances, and in case the plaintiff should not be deemed entitled to have the principal sums due on foot of the said securities paid out of the said personal estate, then, that all interest which had accrued due thereon, previously to the death of the said Ulick Wall Alen, might be paid and discharged out of the said personal estate, and that an account might be taken of the personal estate of the said Ulick Wall Alen, and that the same might be applied in exoneration of the said real estates.

The defendants in their answers insisted that, by the deed of compromise, the real estate conveyed by said deed was made the primary fund for payment of the said debts and incumbrances, and that Luke Alen took the said estate *cum onere*.

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Mr. O'Connell, Mr. Lefroy, Mr. Warren and Mr. James Hardy, for the plaintiff.

The object of this instrument was to adjust the conflicting claims of the parties to a certain real estate; it was a deed of mutual release and compromise, and, therefore, must be construed in reference to the express subject matter only. There was no intention to release \*Ulick Wall Alen's [\*237] personal estate; if a creditor had issued an execution against him, could he have compelled such creditor to resort to the real estate? The effect of the deed was to make Luke Alen merely a surety, and not to exonerate Ulick Wall Alen, and if it did not exonerate him during his life, how can it exonerate his assets after his death? This case is distinguishable from the cases of vendor and vendee, where there is a money-dealing between the parties, and the purchaser considers the amount of the incumbrances, and gives so much the less for the estate. The words "subject to" in a devise, have not the effect of exonerating the personal estate; *Serle v. St. Eloy*; (a) and in a deed they must be construed according to the intention of the parties. Ulick Wall Alen, previous to the execution of this deed, and while in possession, created incumbrances which affected the entire of the estate, and when he agreed to reduce his interest to that of an estate for life, he stipulated that by so doing he should not affect the rights he had given to his creditors. These words therefore were inserted, not for the purpose of exonerating Ulick Wall Alen, but to protect him against litigation, on the part of his creditors, arising from his own acts, and also to prevent Luke Alen from insisting upon holding the moiety (which he had previously claimed to be entitled to), discharged from debts not incurred by himself. The words "subject to," therefore, can mean nothing more than, that, as between the estate and the creditors, their rights were not to \*be [\*238] displaced or affected by this compromise; but, as between U. W. Alen's real and personal estates, no alteration was

(a) 2 P. Wms. 386.

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made in their respective liabilities, and his personal estate, which was the fund primarily liable, previous to the execution of this deed, must continue so.

Mr. *O'Loghlen*, Mr. *Ball*, Mr. *Stock*, Mr. *Blake* and Mr. *Burke*, for the defendants, were not called upon by the court.

THE LORD CHANCELLOR:—I have not the slightest doubt upon this case; I never saw a clearer case. The counsel for the plaintiff have endeavored to found an argument upon the nature of the deed; that argument, however, is not entitled to much consideration, for if upon a contract an estate is conveyed, subject to a mortgage, how can it be said that the personal estate of the vendor is in the first instance subject to that mortgage? Ulick Wall Alen was in possession of the entire estate, and clearly entitled to at least a moiety of it in fee; the person claiming title to the other moiety filed a bill, which was retained with liberty for him to bring an ejectment; accordingly an ejectment was brought, but there was no verdict on the trial of that ejectment. A mortgage had been created many years previously, in which Michael joined, and by so doing bound the inheritance. Ulick Wall Alen (the defendant's testator) had been in possession of the entire estate and had exercised dominion over it, and himself created incumbrances upon it. Now a third person set up a claim to half of the estate, and they \*both agreed to compromise their claims. I cannot consider the relative situation in which the parties to this deed stood, in order to discover their intention, for in the deed they are made to disclose that their intention is to compromise, and I have no means to work out that intention, except by their own words in that part of the deed where they address themselves to the object of it. The intention is plain; the person in possession says, "I will reduce my interest to that of a tenancy for life, and give you the remainder in fee, but if you take the estate you must take it as you find it." For this reason it is, that the deed does not ascertain the *amount* of the debts; and there could not, in my mind, be a more powerful circumstance to prove that Luke Alen took the estate as it stood, *cum onere*.

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If we look at the form of the deed, we shall find that the estate is expressly "subjected to and charged and made chargeable with all leases, deeds, demises, mortgages, gifts, grants, conveyances, judgments, assignments, and incumbrances theretofore made by the said Ulick Wall Alen." And if we turn to the granting part of the deed, though the words "charge and chargeable," are omitted, we shall discover words which include every possible form of incumbrance. If an incumbrancer had gone against Ulick Wall Alen personally, could not the latter have filed a bill, and have thrown the defendant upon the estate? I think he could, for that would not be an attempt to fix a personal responsibility upon Luke, but to \*leave the [\*240] burden where it was originally placed, viz., on the estate. The person who comes in here to shift the responsibility is Luke Alen, who having acquired the estate is bound to take it with the burden upon it.

There is nothing in the deed from which a doubt can be entertained that it declares the estate to be subject to the debts. It is said there is a difference between the recitals and the granting part of the deed: but is there any difference in the legal import, or actual intention of these two parts of the deed? Certainly not. In each part of the deed there is a subjection of the estate to the debts. The effect of one clause in the deed is to give validity to the charges created by Ulick Wall Alen as against Luke Alen himself, and the operation at law is, to give Luke Alen an estate in fee. The interest is to be paid by the tenant for life, and the fee is made liable to pay the debt itself. It is said that Ulick Wall Alen made a will prior to this deed, charging his personal estate with the payment of his debts: it is only by ingenuity that any point can be made upon that. I am told that if there be a devise of an estate subject to debts, that circumstance will not have the effect of exonerating the personalty; but what has that to do with this case? for when a man gives an estate to another, on condition that he pays the debts which affect it, it is clear that that estate is the proper fund for the payment of those debts. The bill must be dismissed with

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costs, so far as it seeks to have the debts paid out of the personal estate.

[\*241] \*This decree was this day affirmed, upon rehearing, by Lord Plunket, who considered himself bound by the recent decision of the House of Lords in the case of *Vandeleur v. Vandeleur*.(a)

(a) VANDELEUR v. VANDELEUR.

1836: 15th May.

J. O. V. being seised in fee of certain estates, limits them upon his marriage, in strict settlement, with a proviso that the said estates should be charged with certain debts set forth in a schedule. Held—that the purchaser under the settlement was not entitled to have the personal estate of J. O. V. applied, after his decease, to discharge the said debts in exoneration of the settled estates.

J. O. Vandeleur, being seised in fee of estates in the counties of Limerick and Clare, by deed made in the year 1800, upon his intermarriage with Lady Frances Moore, in consideration thereof, and of 6,000*l.*, her portion, conveyed the said estates to trustees, in trust for himself for life, and after his decease for terms of years created to raise portions for younger children, and to secure a jointure for his widow, remainder to the first and other sons of the marriage, in strict settlement, with remainder to himself in fee. And the deed contained the following provision: "Provided always, and it is hereby declared and agreed by and between the parties to these presents, that all and every of the said towns, lands, tenements, hereditaments and premises, hereby granted and conveyed, shall, in the first place, stand and be charged and chargeable, and the same are hereby declared to be charged with the several sums due for the portions of the brothers and sisters of the said J. O. Vandeleur, amounting to the sum of 15,900*l.*, and by judgments and bonds hereinafter mentioned, and which said several sums are particularly set forth in a schedule hereunto annexed, and amount to the sum of 12,700*l.*" And the said deed also contained a covenant against incumbrances, with an exception in these words, "other than and except the several sums due by judgments or bonds, to the different persons in the schedule hereunto annexed, amounting in the whole to the sum of 12,700*l.*, and also other than and except the sum of 15,900*l.*, the portions due to the brothers and sisters of the said J. O. Vandeleur, with all and every of which said several sums the

[\*242] said lands and \*"premises are hereby charged." There was also a covenant for further assurance with the like exception, referring to the exception in the preceding covenant. The said J. O. Vandeleur paid off a part of the judgment debts, and declared that such payments were made in exoneration of his settled estate. Part of the debts in the schedule, and part of those paid off, were contracted by the settlor's father, and part were the settlor's own debts.

A bill was filed in the Court of Chancery in Ireland by the executors of J. O. Vandeleur, against his eldest son, and the younger children and his widow, to have the rights of the parties declared, and the trusts of the will carried into effect, and the necessary accounts taken.

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The only question raised was, whether the estates, which the settlor's eldest son, C. M. Vandeleur, took under the settlement, were so charged with the debts in the schedule mentioned as to be borne in the first instance by that estate, in exoneration of the personal estate. Upon the hearing before Lord Plunket, it was decreed that the personal estate, being the fund primarily liable, should be applied in exoneration of the real estate; and from this decree there was an appeal to the House of Lords, and the case having been argued, *Lord Brougham*, after stating the foregoing facts, pronounced judgment, with the following note of which the editors have been favored.

LORD BROUGHAM:—From this decree the parties have appealed, the noble and learned lord who made it having expressed considerable doubt respecting the question, and having recommended the opinion of this House to be taken; and I am of opinion that the decree is erroneous and ought to be reversed, excepting only as regards the costs of the suit below.

With respect to volunteers, there can be no doubt that where a testator leaves real and personal estate, and simply charges his real estate with his debts, without any words of exclusive charge or words exonerating the personalty, in such cases the personal estate is primarily liable, and must \*relieve the real estate, on which the debts are charged, unless they have been charged on that estate exclusively, in exoneration of the personalty. This exclusive charge may be either in express terms, or by manifest intention gathered from construction; the intention of the testator being the sole rule; and even if the parties here were to be considered as equally volunteers, we should be entitled to examine the instrument or instruments in question, with the view of ascertaining whether or not the personalty was intended to be exonerated. This case may be regarded in two lights, first, as if the question lay between volunteers, and next, upon the ground of the holder of the estate being a purchaser under the settlement. First, if we had the case of volunteers to consider, the question would turn upon the intention of the settlor to relieve the personal estate, and charge the real exclusively. Has he shown such an intention in this case? The words are strong; the estates are declared to be, in the first place, charged with the debts, which are set forth in a schedule, for the purpose of specifying to what charge precisely the settled estates are to be subject—what burden they are to bear. In the covenants, too, he excepts those same debts, he covenants that, for the objects of the settlement, the estates are free and discharged, and saved harmless against all debts and charges, except the jointure of his mother, and except the debts scheduled, and he covenants for further assurance, excepting the debts scheduled. It may be observed too, on the principle of "*noscitur a sociis*," that the only exceptions, besides these debts, are those of the family debts, or brother's and sister's portions and the mother's jointure, both of which are unquestionably charged on the real estates and on those only; the personalty has nothing to do with them.

But for this exception in these covenants, for quiet enjoyment and further assurance the personal estate would have been liable in respect of incumbrances, as well as in respect of a deficient conveyance; what then is the object of the exception? plainly to exempt the personal estate from the eventual burden in the one case, and

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certain liability in the other, of and to those debts. There seems, therefore, [\*244] some reason \*to hold, that even regarded as a case between volunteers, the personalty might be held exonerated, under the peculiar circumstances of this settlement; but the other is the principal ground of my opinion. Secondly, the tenant in tail in possession takes under the settlement, and he takes as a purchaser. Suppose Mr. Vandeleur had sold his estate, and left it charged with the debts in the hands of the purchaser, it is plain that the purchaser would have been liable, not only to pay the creditors, if they had gone against him, but if they had gone against the executor, or other personal representative of the vendor, the purchaser would have been liable to repay whatever was thus obtained. Now how is this different from the present case? It is said that if this were a case between vendor and vendee that the purchaser would be liable, because he has paid a less price for the estate by the amount of the charge affecting it. In all probability he might have done so, but it is not a necessary consequence; he might have had the caprice or the kindness to pay the full price, or he might reckon on all the debts being paid, and still the estates would be liable in his hands if the debts should not be paid, and at all events this fact of a diminished price being paid is an accident, and not a circumstance essential to the question, and which can govern its merits.

The settlor, when he leaves the estate charged, means to put in settlement so much the less property. We never can say that this is not considered by him in his settlement; he might answer, "had I not charged the debts on those two estates, I should only have put the Limerick one in the settlement, and left out the Clare one altogether, in which case I might have sold it and paid the debts." The whole transaction must be viewed together, and all the provisions are facts of one scheme, one plan, one agreement. But it is quite enough to say that the amount of what is given on either side never can be taken into consideration in the construction of the settlement, because the purchasers under it take not, on paying any price, but in a wholly different way; they execute their part of the consideration, as it were, through the parties to the marriage contract; the settlor was here one of those, and

[\*245] \*he expressly puts the estate in settlement, subject to the debts, and thereby makes the issue of the marriage take only so much as remains after payment of these. No conceivable distinction can, therefore, be taken between such purchasers under a settlement, and any others; the one class are as little volunteers as the other. The simplest and plainest view of this case seems to be this, what did the settlor convey? how much of the real estate did he put into the settlement? was it only those estates, after deducting certain debts in the schedule? That the amount of those remained undetermined until his death, because he might pay part of them (as he did in point of fact), makes no difference, it only makes the sum to be deducted uncertain in amount, during his life, but the thing in respect of which the deduction was to be made quite clear all the while, namely, the debts scheduled to whatever sum they might amount at the settlor's death.

Lastly, it seems impossible to allow the equities of the parties to be affected by anything that was to be done by the settlor after his marriage, all rights must be taken to be as they were established at the date of the conveyance, otherwise a party might alter the rights of others by things done after the contract was completed. Hence, neither any directions in the settlor's will, nor the state of his affairs at his

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Gregg v. Arrott.

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decease, could possibly alter the construction. And this last observation applies not merely to any argument sought to be raised on the exoneration of the personalty by the express words in the will, a provision which plainly never could prove anything, because, whatever impression the testator and settlor might have had on his mind when he made his will, the only question is, what he did long before by the settlement? But the observation applies also to the entire view taken in the decree below, because that view proceeds upon the principle of the personal estate continuing liable at the testator's death, and so exonerating the real assets descended. The cases of *Noel v. Noel*, (a) and *Waring v. Ward*, (b) contain matter which confirms the view which I have felt it necessary to take of this question, [\*246] though they do not come up to decisions upon the point.

The decree was varied by declaring that the debts in the schedule, reported unpaid at the testator's death, should be and stand as a burden on the settled estates in the counties of Limerick and Clare, and that the personal estate of the testator, in the hands of the executors (the plaintiffs in the suit below) should be exonerated. But it was declared that, in other respects, the decree should stand, and that no parties should have any costs except the executors, the plaintiffs, who should have their costs out of the personal estate, and also their costs of the appeal out of the same fund.

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GREGG v. ARROTT.

1835: 9th February.

A prior mortgagee who has obtained leases, subsequent to a puisne mortgagee, and who has entered into possession, will, as against the latter, be charged as mortgagee in possession. A second mortgagee having the security of estates A. and B., and offering to redeem a prior mortgagee (having the security of estate A. only, and also leases affecting the equity of redemption of the same estate, but subsequent to the second mortgage), cannot be compelled by the prior mortgagee to resort to estate B. in the first instance.

GORMAN GREGG being seised of an estate called the Plains, on the 20th of August, 1827, executed a mortgage of the same to E. Mercer, and afterwards, on the 16th of January, 1828, mortgaged the equity of redemption thereof, together with two other denominations called Ballynascreen and Rose Lodge, to J. Mc'Connell. In July, 1829, the plaintiff, Jane Gregg, became the purchaser of Ballynascreen and Rose Lodge. In October, 1829, E. Mercer assigned his mortgage of the Plains to the de-

(a) 12 Price, 212; S. C. 7 Price, 241. (b) 7 Ves. 332.



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defendants, Samuel Arrott and Thomas Garret; and in the month of December, of the same year, Gorman Gregg [\*247] \*became a bankrupt. John M'Connell, in the following year, assigned his mortgage of the 16th January, 1828, to the plaintiff, Jane Gregg.

The bill which was filed by Jane Gregg charged that the defendants, Arrott and Garrett, had entered into possession of the Plains as mortgagees, and prayed that an account might be taken on foot of the mortgage of the 16th January, 1828, so assigned to her by J. M'Connell, and also an account of the sums due to the defendants, Arrott and Garret, on foot of their mortgage of the 20th of August, 1827, and of prior incumbrances, and also an account of the rents and profits of the said mortgaged premises received by the said defendants, Arrott and Garret, or which without wilful default they might have received; and that upon payment by the plaintiff of the sums which should be found due to the said defendants on foot of their mortgage of the 20th of August, 1827, which she thereby undertook to pay, that the assignees of Gorman Gregg might be decreed to pay to the plaintiff all such sums as should be paid by her to the said defendants on foot of their mortgage, and also the sum due to her on foot of her own mortgage of the 16th January, 1828, or else be foreclosed; and that in such case said mortgaged premises might be sold discharged of the said mortgage of the 20th of August, 1827, so assigned to the defendants as aforesaid.

The defendants, in their answers, insisted that the lands of Ballynascreen (not included in the mortgage) should be [\*248] \*first sold. The defendant, Arrott, also set out a certain lease of the 30th of November, 1829, made to him by Gorman Gregg, in pursuance of agreements to that effect entered into in the months of March and April, 1829, and stated that under and by virtue of said lease he had entered into possession of part of the Plains as lessee.

The cause was heard on the 27th of June, 1834, when the accounts prayed by the bill were directed and it was declared that

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the defendants, Arrott and Garret, should account as mortgagees in possession, under the assignment to them from E. Mercer. The cause was now reheard at the instance of the defendant, Arrott.

Serj't Green, Mr. Warren, and Mr. Whiteside, for the plaintiff.

Mr. Lefroy, Mr. Holmes, and Mr. Andrews, for the defendant, Arrott.

The plaintiff became the purchaser of Ballynascreen and Rose Lodge, part of the premises included in the mortgage to M'Connell; it must be presumed, therefore, that that mortgage was paid off by the purchase money. At all events, at the time of the sale, the defendants had a right, as against M'Connell, who was mortgagee both of Ballynascreen and the Plains, to compel him to resort to Ballynascreen, in the first instance, in exoneration of the Plains; *Aldrich v. Cooper*; (a) and the plaintiff, who was assignee of M'Connell's interest, must [249] take subject to all his equities. The defendant, Arrott, has likewise a lien upon the equity of redemption of the Plains, by virtue of his equitable leases, he is therefore entitled to make Ballynascreen, in the hands of the plaintiff, contribute towards the payment of the prior incumbrances. The bill is not a simple bill of redemption, but it prays for a sale; the plaintiff, therefore, if she gets the relief she seeks, will come back here, and have the lands sold discharged of the leases. She is not entitled to disturb the defendant's lien until she first shows that the lands of Ballynascreen are insufficient to satisfy her demand. The decree is also erroneous in charging Arrott as mortgagee in possession, his possession should be referred to his character of lessee and not to that of mortgagee.

THE LORD CHANCELLOR:—The first point stated is, that the purchase money, produced by the sale of Ballynascreen to the plaintiff, was applied to pay off the second mortgage, but that is answered by the fact, that the assignment of the second mort-

(a) 8 Ves. 382.

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gage did not take place until after the sale. Secondly, it is said, that the defendant, Arrott, did not enter into possession as mortgagee but as lessee, but I must hold that he entered into possession as mortgagee, for if he entered as lessee, to whom would he be accountable but to himself? If there be two mortgagees, and the prior mortgagee enters into possession, it must be in his character of mortgagee: and any rights which he has [ 250] acquired subsequently \*to the second mortgage can be set up only against the person from whom he derived them; the decree, therefore, is not wrong in charging this defendant as mortgagee in possession. Then it is said that this is a case for contribution; no such question can arise; there can be no complaint here of the insufficiency of the security, for the defendants must be paid every shilling that is due to them. The plaintiff offers to pay them the amount due on foot of their mortgage, and they cannot be redeemed until they are paid off. The case is not within the principle of *Aldrich v. Cooper*, which is this: where one person has a charge on estates A. and B., and another a charge on estate A. only, and the estate doubly charged is insufficient for the payment of both, the person having the double fund is thrown upon the estate not common to both, leaving the other estate open for the second incumbrancer; but in this case the second mortgagee who has the security of the two estates, offers to pay to the prior mortgagee every shilling due on his security. This case, therefore, has nothing to do with the principle of *Aldrich v. Cooper*.

After the prior mortgage of the Plains, and after the second mortgage of the equity of redemption of the Plains and of Ballynascreen, the defendant, Arrott, obtained equitable leases of part of the Plains, and he now alleges that the plaintiff is bound to let in those leases; but I think the second mortgagee should not be damaged, and that he has a right to resort to both estates, and that no subsequent dealing between the mortgagor and [\*251] the defendant can \*affect him. The defendant, Arrott, also, if he can make out a clear and distinct right as lessee, independently of his mortgage, will be entitled to redeem.

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But then he further says he has a right to bring in Ballynascreen in order to exonerate the Plains, so as to give operation to his leases over that estate; but as regards the second mortgagee he has his right of priority, and the right of the defendant, as lessee, comes in after his, and I do not know whether he will ever claim that right. The plaintiff purchased Ballynascreen, and no notice was taken in the deed of conveyance of the existence of any mortgage upon those lands. I must assume, therefore, that she was a purchaser without notice. The following year, in order to protect herself, as I suppose, she took an assignment of the second mortgage as that necessarily clashed with her title as purchaser. And it is sought on the principle of *Toulmin v. Steere*(a) to deprive the plaintiff of her rights as mortgagee, on the ground that she cannot hold as purchaser and defeat the lessee by taking an assignment of a prior mortgage. That case went further than any previous authority, and Sir Samuel Romilly and I thought it at the time wrong, and recommended an appeal, but a relative of the party charged preferred paying the money to encountering any further litigation. Now, if the defendant, Arrott, has any equity on this head he must assert it by filing a bill detailing all the circumstances, and contesting the right of this lady.

If indeed his \*leases were of the lands of Ballynascreen [\*252] he might contest her right in the present suit, but his leases are leases of the Plains, and his equity must be against her as a purchaser and not as mortgagee. In my opinion he has not taken the proper course to work out his rights; the decree does not damage the defendants if they are paid all that is due upon their mortgage. I shall give no directions as to what is to be done when the defendants are paid off; that involves a nice equity, and must depend upon the evidence. I have a shrewd suspicion, and I think it so probable (as Mr. Holmes has stated) that this lady will come back to sell the lands discharged of the leases, that I would advise the defendant, Arrott, if he has any equity, take steps to establish it, before the probable consequences can occur. The plaintiff is entitled to the costs of the rehearing.

(a) 3 Mer. 210.

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Averall v. Wade.

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## AVERALL v. WADE.(a)

1835: 16th February.

A party seized of several estates, and indebted by judgment, settles one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledges other judgments. Held—that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estate contribute.

A judgment creditor has not any specific lien on the land, and in general cannot have any relief against a mortgagee who is a specific incumbrancer.

SAMUEL WADE being seized in fee of several freehold estates, and being indebted by judgments to different persons, on the 11th of January, 1813, upon the marriage of his son, [\*253] Thomas, conveyed one of the said estates to *the use of the said Thomas for life without impeachment of waste, "and from and after his death to the use of the first and every other son of the marriage in tail male, and their issue male respectively, according to seniority, &c.,"* and in default of such issue male, then to the use of the issue female of the marriage, in such shares, &c., as the said Thomas should appoint, &c. The settlement contained a covenant on the part of said Samuel Wade, that the said lands were "free and clear, and freely and clearly acquitted and discharged of and from all former and other gifts, grants, settlements, judgments and other incumbrances whatsoever." Samuel Wade died in 1826. The bill was filed by a creditor who had obtained a judgment against the said Samuel Wade in Hilary, 1813, subsequently to the said settlement. There were two questions raised, first, whether the judgments, prior to the settlement of 1813, should be thrown exclusively on the settled estate in exoneration of the unsettled estates; and, second, if the settled estate should not be considered liable to exonerate the unsettled estates, whether the subsequent judgment creditors had a right to make the settled estate contribute to the payment of the prior judgments.

(a) 1 Molloy, 567.

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Serjeant *Greene*, Mr. *Brewster* and Mr. *Collins*, for the plaintiff, and other judgment creditors, subsequent to the settlement of 1813.

The prior judgments affect both the settled and unsettled estates, the subsequent judgments affect only the unsettled estates, on the principle, therefore, in *Aldrich v.*

\**Cooper*,<sup>(a)</sup> the subsequent judgment creditor having [\*254] only one fund, has a right to compel the prior judgment creditor, who has two funds, to resort to that fund which is not common to both. If the court should not carry the principle to that extent, the settled estate is at least bound to contribute to the payment of the prior judgments; *Hartley v. O'Flaherty*.<sup>(b)</sup> The prior judgments, which override all the estates, are analogous to the crown debt in that case.

Mr. *Scott*, Mr. *Moore* and Mr. *William Brooke*, for the parties deriving under the settlement of 1813.

The settlement contains a covenant that the settled lands are free from incumbrances. Thomas Wade was, therefore, at the date of the settlement, entitled to have the prior judgments paid out of the unsettled estates, and no subsequent dealings between the settlor and third persons can divest that right. The case of *Hartley v. O'Flaherty* was overruled on rehearing by Lord Plunket, who held that the portion of the property in the hands of the last purchaser was first applicable. *Ex parte Kendall*<sup>(c)</sup> and *Kirkham v. Smith*,<sup>(d)</sup> *Selby v. Selby*<sup>(e)</sup> were cited.

17th February.—Mr. *Blake*, for a subsequent judgment creditor.

The settlement is defective, as no words of pro-creation \*are used, and a court of equity will not supply [\*255] the defect against creditors, particularly after the death

(a) 8 Ves. 382.

(b) 1 Beatty, 61

(c) 17 Ves. 514; S. C. 1 Rose, 71.

(d) 1 Ves. Sen. 258.

(e) 4 Russ. 336.

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of the settlor; those deriving under the settlement have, therefore, no higher equity than the judgment creditors. Secondly, those deriving under the settlement are mere covenantees, and therefore, only specialty creditors, having no specific lien on the estate; *Fremoult v. Dedire*; (a) and must come in *pari passu* with the other creditors.

THE LORD CHANCELLOR:—This is a case of considerable importance, there is very little direct authority on the point. The general doctrine is this, where one creditor has a demand against two estates, and another a demand against one only, the latter is entitled to throw the former on the fund that is not common to them both. This is a narrow doctrine, and cannot generally be enforced against an incumbrancer, who is a mortgagee. Whatever may be the equity of the creditor with only one security, the mortgagee of both estates has a right to compel the debtor to redeem, or he may foreclose. In Ireland, indeed, there would be a decree for a sale, and the mortgagee would be entitled to no more than his money, and the court would deal with the surplus in such manner as it might think fit, so that the equity might be worked out; but not so in England.

This is a naked case, and we are first to examine the [\*256] \*effect of the covenant, and next to consider the point now made by Mr. Blake. There are two judgments entered up against the owner of estates A. and B., and the person against whom the judgments were obtained, settles estate A., previous to the second judgment, for valuable consideration. The settlement is dated early in January, 1813, and in Hilary, 1813, a judgment was entered against the settlor. The first point made on the part of the subsequent judgment creditor was, as to his right to throw the prior judgment altogether on the settled estate, and so leave the unsettled estates as an open fund for his demand. The second point he made was, that, supposing he is not entitled to that relief, he is at least entitled to a contribution from the settled estates. Now there can be no

(a) 1 P. Wms. 429.

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doubt that those claiming under the settlement cannot be forced to pay more than their proportion, and they would have a right to contribution from the unsettled estates. A subsequent transaction cannot *increase* the charge on the settled estate. *Lanoy v. Duchess of Athol*,<sup>(a)</sup> goes only to a limited extent: "suppose a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the court, in order to relieve the second mortgagee, has directed the first to take a satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgage, even though the estate descended to \*two different persons." Lord Hardwicke [\*257] does not put it higher than this, that where there is a descent to two different persons, they do not stand in a better situation than the original debtor, from whom they both must claim. In *Boazman v. Johnson*<sup>(b)</sup> the bond creditors were stated to be in the same situation as pointed out in *Aldrich v. Cooper*, having but one fund, and the mortgagees having two funds; and they desired to throw the mortgagees on the freehold estates, and leave the rectory to them for the payment of their demand. The answer was, "you must take what you have got and just as you find it; although the mortgagees have a right against both, yet you cannot throw them over on the freehold estate, as there was a stipulation to clear it, as far as could be done, for the benefit of the children, by means of this very fund." In *Aldrich v. Cooper*<sup>(c)</sup> (and the same point has been decided in *Gwynne v. Edwards*,<sup>(d)</sup> and in other cases), it was held that although there was a covenant to surrender the copyhold estates to secure the payment of the mortgage, yet the freehold and the copyhold were to be considered a common fund. In page 388, Lord Eldon, speaking of the effect of marshalling, says, "suppose there was no freehold estate, but there was a copyhold estate which the owner had subjected to a mortgage, and died, it is clear the mortgagee, having two funds, might, if he pleased, resort to the copy-

(a) 2 Atk. 446.

(c) 8 Ves. 382.

(b) 3 Sim. 377.

(d) 2 Russ. 289.



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hold estate, but would this court compel him to resort [\*258] to it? if so the court marshalls \*by the necessary consequence of its act." In page 389: "How then is he allowed in this court effectually to apply for satisfaction? not upon the ground that it is assets, either by will or by contract *inter vivos*, but upon the ground that the specialty or mortgage creditor, having two funds, shall not by his will resort to that, by going to which, he would disappoint as just a creditor who cannot resort to any other." And at page 390, "The estate is charged expressly with the payment of that debt, and, therefore, if the freehold and copyhold estates go to different heirs, that charge is the foundation for this court's applying the principle of contribution, not because it is assets, but because it is charged, not being assets." Again, in page 391, "It is clear, if no third persons are concerned, the court would arrange between the two estates, if they went to different persons; in that case if no third persons were concerned, and the estates were of equal value, that sum would be divided between them, and the simple contract creditors would receive the whole personal estate." We see here how carefully Lord Eldon puts it, "If there are no third persons concerned." In page 395, "Suppose another case, two estates mortgaged to A., and one of them mortgaged to B., he has no claim under the deed upon the other estate, it may be so constructed that he could not affect that estate after the death of the mortgagor, but it is the ordinary case to say, a person, having two funds, shall not by his election disappoint the party having only one fund, and equity, to satisfy both, will throw him who has two funds, upon that which can be af- [\*259] fected \*by him only, to the intent that the only fund to which the other has access may remain clear to him."

Upon the whole of the case, therefore, you will find Lord Eldon, in the application of the principle, carefully avoids dealing with the rights of third persons intervening. I cannot say that I feel any doubt on the first point, as to the right claimed by the subsequent creditor to throw the whole of the prior incumbrance on the settled estate; there is no such equity.

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Whether he is entitled to a contribution against it is involved in the consideration of the question raised by the persons claiming under the settlement, which is directly the converse of the former, and depends upon a different principle. They contend that the unsettled estate is to bear both the judgments, and that the second creditor is entitled to no relief against the settled estate. Suppose there was no covenant in the settlement: a man seised of estates A. and B., both subject to a judgment debt, settles A. for valuable consideration, without noticing the judgment; the judgment creditor would be compelled to go against estate B., and the persons claiming under the settlement would be entitled to have the settled estate exonerated, at the expense of the unsettled estate; the judgment binds both, and where there is a settlement of part of an estate, as if free from incumbrance, equity will throw the whole on the unsettled part, which still belongs to the original owner. Here there is a covenant that the estate is free from incumbrances: assuming that \*there was no such covenant, but a mere declaration [\*260] that the estate was free from incumbrances, there can be no doubt that that declaration would throw the incumbrances on the unsettled estates. I cannot put the point on lower grounds, but I can put it on much higher. The covenant is enforced, not by giving damages, because this court does not give damages, but according to the peculiar jurisdiction of this court, by specifically doing that which ought to be done. I thought, therefore, that, by reason of the covenant, the judgment should be thrown altogether on the unsettled estate. Mr. *Blake* has started a fair point, but it does not alter my view of the law. I am glad, however, that he has had an opportunity of arguing the question, as I should be sorry that any point should not be considered which he thought would be of benefit to his client. It is first said, that the settlement is informal, and did not execute its purpose; it is, however, a good settlement in equity, and the court will effectuate the intent of the parties. That is a settled point. I must, therefore, consider the settlement as if actually remodelled. The equity binds the land: I am not now speaking of a person who takes for valuable consideration without

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notice, but as against every person, unless a purchaser for valuable consideration without notice, it will be deemed a good settlement. But then it is said that the covenant cannot be specifically executed after the death of parties; I never heard that point raised before. The only case I recollect on

the subject is *Morse v. Faulkner*,<sup>(a)</sup> there the party  
[\*261] \*was not entitled at the time of the conveyance,

but afterwards acquired the title by descent, and the court seemed to think that there was a personal equity, and not descending with the land. I am not of that opinion. *Fremoult v. Dedire*<sup>(a)</sup> has been cited, but that does not touch this point, for in that case there was a specific covenant to settle a particular estate, and likewise a general covenant to settle lands of a certain value, and it was held that the latter did not bind any particular estate, and that as there were no words specifically binding the estate it was to be regarded as a mere general covenant not binding any lands in particular. But the covenant in this case is a continuing covenant, and of which there ought to be a specific execution, and in effect it has executed itself, and by force of that covenant the estate must be considered in equity, as between the parties, as discharged of the judgments which must be thrown on the unsettled estates. In regard to the claim by the latter judgment creditor to a contribution against the settled estates, I must consider the character of the party making this claim. Is he claiming in equal rights? Does he stand in a relation entitling him to have contribution? I think not. Sir Anthony Hart in the case of *Hartley v. O'Flaherty*, in which there does not appear to have been any difference of opinion between him and Lord Plunket, merely arranged the equities in express words; that every person, according to his priority, had an equity to throw off the incumbrance upon the unsold  
[\*262] portion, and so each purchaser \*to keep throwing it off until it fell upon the last unfortunate purchaser. I am not called upon to give any opinion on that case. It does not decide the point before us. It was merely a decision on the

(a) 1 Anst. 11; S. C. 3 Swann, 429, n.

(a) 1 P. W. 429.

general equities, and on the particular provisions of the Acts of Parliament, which certainly presented considerable difficulties in the way of the decision. It will be found difficult to reconcile all the parts of Lord Chancellor Hart's judgment. A judgment creditor has not any specific lien on the land. He has only a general lien over all the estate of his debtor. A general creditor does not stand in the same right as a specific incumbrancer, and, therefore, in ninety-nine cases out of one hundred, he cannot have any relief against a mortgagee who has a specific lien. In *Finch v. Earl of Winchelsea*(a) many cases were cited, among the rest *Burgh v. Francis*,(b) where a defective mortgage in fee, the estate in equity being specifically bound, was preferred to a subsequent judgment. That is precisely the case before me, and, therefore, though a defective conveyance, yet, as the judgment creditor has no specific lien, it must be made good against him.

When the passage from *Kirkam v. Smith*(c) was first read, it struck me that it was not right, but I find that Lord Hardwicke avoided the difficulty, for he says, on a bill for foreclosure or sale, the equity would be that the \*estate purchased should not be liable unless the other part was not sufficient for the satisfaction. That was a strong case. Hugh, the tenant in tail, paid off a mortgage secured by a term for years, the former tenant in tail having suffered a recovery of a part, had sold it, and taken for it in exchange another estate; after the death of Hugh the mortgage debt was held to be kept alive for the benefit of his representatives; and those in remainder said that if they were liable to any part, yet they were not liable to the whole debt, and that the other estate was bound to contribute a proportion; yet Lord Hardwicke decreed that they were bound to pay the whole, and that they had no right of contribution against the exchanged estate. Lord Hardwicke did not even go so far as to say, there should be a contribution where

(a) 1 P. W. 277.

(b) 1 Eq. Ca. Ab. 320; S. C. 3 Swans. 536, n.

(c) 1 Ves. Sen. 258. See *Lloyd v. Jones*, 9 Ves. 61.

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there has been a dealing with the property, which has changed its character. In *Ex parte Kendall*(a) Lord Eldon was guarded in his observations, and always kept in mind that the rights of third persons could not be affected by any arrangement entered into between the parties. In *Hamilton v. Royce*(b) Lord Redesdale carries the doctrine as to the exoneration of one estate by another very far: Lord Redesdale there says, "the rule is very clear; a purchaser takes subject to all the equities to which the vendor was subject, and of which the purchaser has notice. Here the purchaser takes under a settlement of January, 1788, without that settlement he has no title, consequently he [\*264] takes \*with notice of that settlement, and taking with notice of that settlement, he takes with notice of a clear equity against the estate which he has purchased." Now I do not conceive that a purchaser is bound to know all the equities springing out of a particular deed. That case, I think, goes too far; but I do not mean to question incidentally what Lord Redesdale decided on full deliberation, and I am sure on solid grounds, and which must have satisfied him at the moment, although at present I do not feel the full weight of them. There are many other cases, but the result on the whole is, that there is no right to throw any part of the first judgment on the settled estate, but that, on the contrary, that estate had a right to be indemnified against it, at the expense of the unsettled estate, and no subsequent judgment creditor can disturb that right after it has once attached.

As to the right of *contribution*, in addition to the cases mentioned in the text, see *Herbert's case*, 3 Coke, 12, b.; 2 Ins. 118, 395; *Dyer*, 331, b. 332, a.; *Fitz. Nat. Brev.* 103, 104; *Gilbert on Executions*, 114; *Plow.* 72; *Bac. Ab. Execution*, lit. B. 4; 5 *Vin. Ab.* 561, tit. *Contribution*; and 2 *Eq. Ca. Ab.* 223, where the old authorities are collected. And the following cases relating to this subject may be found useful.

A *specific devisee* cannot be made to contribute upon an average with the heir at law towards satisfaction of creditors; *Palmer v. Mason*, 1 Atk. 505; *Galton v. Hancock*, 2 Atk. 430; *Davis v. Topp*, 2 B. C. C. 259, n.; *Barnwell v. Caudor*, 3 Mad. 453

(a) 17 Ves. 514; S. C. 1 Rose, 71.

(b) 2 Sch. & Lef. 315.

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But a specific devise of a mortgaged fee simple estate shall not have contribution from a specific legatee of personality for the payment of the mortgage debt; *O'Neal v. Mead*, 1 P. W. 693; nor a specific legatee of a \*mortgaged leasehold [\*265] from a specific legatee of other leaseholds; *Halliwell v. Tanner*, 1 Russ. & M. 633. But where all the estates are charged by the testator with the payment of his debts, the specific devisee of a mortgaged estate is entitled to contribution from the specific devisee of another estate; *Carter v. Barnadiston*, 1 P. Wms. 505, S. C. 3 B. P. C. ed. Toml. 64. And a specific legatee of leasehold is entitled to contribution for the payment of general specialty debts, from the specific devisee of freehold; *Long v. Short*, 1 P. Wms. 403, S. C. 2 Vern. 756. Where a testator creates a mixed fund from real and personal estate, and directs that fund to be applied in payment of debts and legacies, the real and personal estate must contribute in proportion to their relative amounts; *Roberts v. Walker*, 1 Russ. & M. 752. The devisee of an estate contracted to be sold, and the legatees and annuitants under the purchaser's will, decreed to contribute ratably to the payment of the purchase money; *Headley v. Readhead*, Coop. 50.

If a man grant a rent charge out of all his lands, and afterwards sell them by parcels to different persons, and the grantees of the rent charge resort to one only of the purchasers, the latter shall have contribution from the other purchasers; Cary, Rep. 3. But where by a marriage settlement an estate was charged with jointure for a wife, and the husband subsequently devised a part to her, it was held that the part so devised to her should not contribute to the payment of the jointure; *Knight v. Calthorpe*, 1 Vern. 347; *Grigby v. Powell*, 5 Sim. 290. One under lessee may compel the other under lessees to contribute towards the payment of rent issuing out of all the premises; *Webber v. Smith*, 2 Vern. 103. The grantee of an annuity charged upon a leasehold is not bound to contribute to the expense of a renewal; *Maxwell v. Ashe*, 1 B. C. C. 444, n., see also 7 Ves. 184, where the same case is more fully stated by *Sir William Grant* from the Reg. Lib.; *Moody v. Matthews*, 7 Ves. 174; but annuitants, equally the object of testator's bounty, must contribute towards the renewal fines; \* *Winslow v. Tighe*, 2 Ball & Bea. 195; *Stubbs v. Roth*, 2 [\*266] Ball & Bea. 548.

The old rule was, that a tenant for life of a leasehold interest should contribute one-third towards the renewal fines, *Verney v. Verney*, Amb. 88; S. C. 1 Ves. Sen. 428, and also to the payment of mortgages and other charges; *Ballet v. Spranger*, Pr. Ch. 62; *Cornish v. Mew*, 1 Ch. Ca. 271; *Clyat v. Balleson*, 1 Vern. 404. But the rule is now otherwise, and the tenant for life is bound to contribute in proportion to his benefit; *Nightingale v. Lawson*, 1 B. C. C. 440; *Stone v. Theed*, 2 B. C. C. 243; *White v. White*, 9 Ves. 554, 559, S. C. 4 Ves. 24, and 5 Ves. 554; *Montford v. Cadogan*, 19 Ves. 635, S. C. 2 Mer. 3; *Allan v. Backhouse*, 2 Ves. & Bea. 65; affirmed, 1 Jac. 631; *Randall v. Russell*, 3 Mer. 190; *Playfers v. Abbot*, 2 Russ. & Myl. 97; and see *Shaftesbury v. Marlborough*, 2 Russ. & Myl. 111. In *Hansard v. Kemys*, 2 Wils. Ch. Ca. 123, a portioner under a settlement was held not bound to contribute.

*Sureties*, though bound by different instruments, whether jointly or severally, but for the same principal and for the same engagement, must contribute; *Dering v. Winchelsea*, 2 Bos. & Pul. 270; S. C. 1 Cox. 318; *Mayhew v. Cricket*, 2 Swans.\*185, and see the note to that case, p. 193; S. C. 1 Wils. Ch. Ca. 418; but not so if the

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suretyship of each is a distinct transaction; *Cooper v. Twynam*, 1 Tur. & Russ. 486. In equity one of three sureties having paid the entire debt is entitled to recover a moiety for contribution from a co-surety, the third having become insolvent; *Peter v. Rich*, 1 Ch. Rep. 19; *Hole v. Harrison*, 1 Ch. Ca. 246, S. C. Finch. Rep. 15, 203. But at law one of several sureties, who has paid, can, as against any one of the others, recover no more than an aliquot proportion, regard being had to the number of the sureties; *Cowel v. Edwards*, 2 Bos. & Pul. 268; *Brown v. Lee*, 6 Barn. & Cres. 689, S. C. 9 Dow. & Ry. 700; and both at law and in equity a surety, who has been reimbursed a part, is entitled to contribution for the balance only; *Swain* [\*267] *v. Wall*, 1 Ch. Rep. 80; *Knight v. Hughes*, 3 Car. & Pay. 467; S. C. 1 Moody & Mal. 247; but see *ex parte Gifford*, 6 Ves. 805.

Time given to a surety, without the privity of the co-surety, will not, upon his paying the debt, affect his right of action for contribution against such co-surety; *Dunn v. Slee*, Holt, N. P. C. 399; S. C. 1 Moore, 2. A surety, who has paid after verdict against him, may recover from his co-surety a moiety of the amount of the verdict, but not the moiety of the costs of the action; *Knight v. Hughes*, 3 Car. & Pay. 467; S. C. 1 Moody & Mal. 247. Nor will he be allowed interest against his co-surety upon the money paid by him; *Onge v. Truelock*, 2 Molloy, 42.

Though the right of contribution exists among co-sureties, yet a surety for a surety is not liable for contribution; *Craythorne v. Swinburne*, 14 Ves. 160, overruling *Cooke v. —*, 2 Frea. 97. A party who has become a surety at the instance of his co-surety, is not liable to be called upon for contribution by the person at whose request he entered into the security; *Turner v. Davies*, 2 Esp. N. P. C. 478. There is no contribution as between joint wrong doers; *Merryweather v. Nixan*, 8 T. R. 186; *Farebrother v. Ansley*, 1 Camp. 345; *Ansell v. Waterhouse*, 6 M. & S. 390; *Thwaite v. Warner*, Bull. N. P. Dig. 88; *Petrie v. Hannay*, 3 T. R. 418; but see and distinguish *Lingard v. Bromley*, 1 Ves. & Bea. 117, and *Woolley v. Batte*, 2 Car. & Pay. 417.

As to the right of contribution between partners and joint contractors, see *Abbot v. Smith*, 2 Wm. Black, 947; *McIlreath v. Margelson*, 4 Doug. 278; *Wright v. Hunter*, 5 Ves. 792; *Holmes v. Williamson*, 6 M. & S. 158; in re *Webb*, 2 Moore, (B) 500; *Barnell v. Minot*, 4 Moore, 340; *Browne v. Gibbins*, 5 B. P. C. Ed. Toml. 491.

Joint creditors having proved against one or more of the separate estates, the estate so burdened is entitled to contribution from the rest; *Ex parte Willock*, 2 Rose, 392; *ex parte Wylie*, 2 Rose, 393. The joint estate of bankrupts, who were jointly and severally bound to the crown, having paid beyond its due proportion, the separate estate was decreed to contribute; *Rogers v. Makensie*, 4 Ves. 752. One assignee [\*268] can enforce contribution from his co-assignee; *Hart v. Biggs*, Holt, N. P. C. 245; *Lingard v. Bromley*, 1 Ves. & Bea. 114.

The general principle of marshalling is, that where one claimant has two funds to resort to, and another only one, the court will either compel the person having the double security, to resort to that fund not liable to the demand of the other, *Lansy v. Duchess of Athol*, 2 Atk. 446; *Aldrich v. Cooper*, 8 Ves. 391, 396; *Greenwood v. Taylor*, 1 Russ. & M. 187; or if satisfaction has been already obtained by him who has the double security out of the fund, to which alone the other can resort, the court will allow the latter claimant to stand in the place of the former *pro tanto*; see the

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Averall v. Wade.

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note to *Clifton v. Burt*, 1 P. Wms. 679, where the principal authorities are collected.

As the recent statute of the 3d & 4th Wm. 4, c. 104, has made freehold and copyhold estates assets for the payment of simple contract debts, the doctrine of marshalling must now be principally confined to cases where legatees are concerned. Since that statute, it must follow that where *legacies* are given by will, and not charged on the real estate, and the personalty has been exhausted in the payment of simple contract creditors of the testator, the *legatees* will, as against the *heir* at law, be entitled to stand in their place in respect of the real estate; see *Herne v. Meyrick*, 1 P. Wms. 201; *Clifton v. Burt*, ib. 678; *Tipping v. Tipping*, ib. 730; *Hanby v. Roberts*, Amb. 128; *Fmhouliet v. Passavant*, 1 Dick. 253; *Aldrich v. Cooper*, 8 Ves. 396. But not as against the *devisees*, *Haslewood v. Pope*, 3 P. Wms. 324; *Scott v. Scott*, 1 Eden. 468, S. C. Amb. 383; *Forrester v. Leigh*, Amb. 172; *Aldrich v. Cooper*, 8 Ves. 396. But where freehold lands, though specially devised, are subjected by the testator to his debts, or are devised subject to a mortgage created by him, and the debts or mortgage are paid off out of the personal estate, the legatee will be permitted to receive their legacies out of the freehold estate; see *Lutkins v. Leigh*, Cas. T. Talb. 53; *Forrester v. Leigh*, Amb. 173, 174; *Foster v. Cooke*, 3 B. C. C. 347; *Bradford v. Foley*, and *Webster v. Alsop*, ib. 351, n.; *Norman v. Morrell*, 4 Ves. [\*269] 769; *Aldrich v. Cooper*, 8 Ves. 396; *Wythe v. Henniker*, 2 Mylne & Keen, 644; but not where the residue only of the personal estate is given to the legatee, *Arnold v. Chapman*, 1 Ves. Sen. 110.

Although a *covenantee* in a voluntary settlement is to be considered a creditor, yet he is not entitled to compete with simple contract creditors for valuable consideration, but as against the *devisees* has a right to stand in the place of mortgagees who have exhausted the fund provided by the testator for the payment of simple contract debts; *Lomas v. Wright*, 2 Mylne & Keen, 769.

Where a vendor is satisfied out of the personal estate of the purchaser in exclusion of a *legatee*, it would seem from the late decisions that such a *legatee* will be allowed to resort to the vendor's lien on the estate purchased in the hands of the heir at law; *Austen v. Halsey*, 6 Ves. 475; *Trimmer v. Bayne*, 9 Ves. 209; *Machreth v. Symmons*, 15 Ves. 345; *Headley v. Readhead*, Coop. 50; *Selby v. Selby*, 4 Russ. 336; *Wythe v. Henniker*, 2 Mylne & Keen, 635; but see *Coppin v. Coppin*, Sol. Ca. Ch. 28; *Pollack v. Moore*, 3 Atk. 272, contra, and see *Sir E. Sugden's* observations upon this subject, 2 Vend. & Pur. 9th Ed. 67.



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 Phillips v. Eastwood.
 

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[\*270]

\*PHILLIPS v. EASTWOOD.

1835: 13th &amp; 14th February.

Testator was entitled to a rent-charge or annuity (issuing out of an estate of a tenant for life), equivalent to the amount of the annual interest upon the purchase money of the annuity, and the annual premiums payable upon policies of insurance effected upon the life of the tenant for life, to secure the repayment of the principal; and by a subsequent parol agreement, the annuity was made determinable by either party. Held—upon the entire transaction, that this annuity and the policies, being merely the securities for a debt, passed under a bequest of all the "*outstanding debts owing*" to the testator. Held, also—that the word "*debentures*" in a will, was sufficient to include general policies of insurance.

Testator having bequeathed "all the outstanding debts owing to him for title or otherwise, *subject* to his debts and legacies," and having appointed general residuary legatees. Held—that the outstanding debts, and not the residuary fund, should be applied in the first instance to the payment of the debts and legacies.

A bequest to M. E., testator's wife, of "the legal interest on bonds, debentures and funded property, together with household furniture, &c., to be disposed of as she shall think proper:" and in case F. E. should survive the said M. E., that he should have "the interest of money, and whatever does belong to her that she does not dispose of." Held—that M. E. having survived F. E., the absolute gift to her was not cut down by the subsequent bequest over, and that that bequest was void for uncertainty.

A policy of assurance on the life of a debtor is a security for a sum to be paid, and may pass in a will under the words debentures or debts.

THE Rev. William Eastwood, rector of Kilsoran, made his will in the following terms:

leave and bequeath unto my dearly beloved wife, Mary Eastwood, the rents, issues and profits of my freehold estate of Drombilly, in the barony of Upper Dundalk, in the county of Louth, and all the arrears of rent that may be due thereon at the time of my death, with power to sue for and recover the same, as I myself possess, during her natural life. I also leave [\*271] and \*bequeath to her the issues and profits of my property, in land and house, situate in the county of Wexford, during her life, if my interest in them, or in any of them, so long continue, subject to such rents as I am, and pay. I leave her also the legal interest on such bonds, debentures or funded

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property as I shall be possessed of at my death. I also leave her all my household furniture, plate, books, stock, cows and horses, carriage or carriages, with whatever wine and spirits I shall be possessed of, to be used and disposed of as she shall think proper. I leave her also all my outstanding debts that may be owing to me for tithe, or otherwise, subject, nevertheless, to such debts as I may owe to my funeral expenses, and to such legacies as I shall now mention, or shall hereafter mention, as a codicil to this will. I also leave her all the ready money I may have in possession, or in bank or banks. My will further is, that my brother, Francis Eastwood, shall, on the death of my said wife, if he survive her, inherit and enjoy all the rents of Drombilly, interest of money, and whatever does belong to her, that she does not dispose of. And my will further is, that Robert Murphy, Esq., of the city of Dublin, who is married to my niece, Jane (late Atkinson), shall inherit and possess my property in Newry, on the death of the Rev. Gervais Tinby, as also my freehold property in Drombilly aforesaid in perpetuity. My wish is, that the same properties in Newry and Drombilly should be given to my \*namesake, their son, William, in preference to any [\*272] other of their children, or left to him at their decease. I leave to Miss Frances Jane Tench the sum of 1,000*l*. I leave to Denis and Elizabeth Keenan a bond for 500*l*. one of those passed to me by the Earl of Rathdown, when he was Lord Monck. I hereby nominate and appoint Michael Phillips, of the city of Dublin, my executor, and bequeath 100*l*. to him, as a remuneration for his trouble. I also nominate and appoint James Eastwood, of Castletown, in the county of Louth, and Robert Murphy, of the city of Dublin aforesaid, Esquires, my residuary legatees."

The testator afterwards added the following codicil :

Whereas I am possessed of a rent charge of 60*l*. a year, of the late currency, on the lands or demesne of Solsboro, in the county of Wexford, forever, liable to be reclaimed for the sum of 1,000*l*. I hereby bequeath the same rent charge, or purchase money, to

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Miss Frances Jane Tench, for her sole use, after the death of my wife, and not before. I also leave and bequeath to the same Frances Jane Tench the sum of 500*l.* sterling, in addition to the sum of 1,000*l.* left her in the first part of this will, which sum of 500*l.* is to be paid to her on the death of my wife. To Denis and Elizabeth Keenan, I bequeath 445*l.* 17*s.* 10*d.*, sterling, which sum is the amount of a *certificate, and coming to me* by and from my successor in the benefice of Kilsoran, for buildings [\*273] \*done on the glebe by me; this sum is for, and in lieu of the bond mentioned in the former part of this will, which is scratched over and blotted by myself."

The personal property of the testator, at the time of his death, consisted of bonds to secure sums of money payable with interest, to the amount of 4,787*l.*; a bond passed by Lord Rathdown, as a collateral security for an annuity; one government and two Wexford-bridge debentures; 1,189*l.* 15*s.* 1*d.* in bank, and a sum of 725*l.* 11*s.* 9*d.* due for arrears of tithes, and also a sum of 445*l.* 17*s.* 10*d.* due for buildings in the glebe house of Kilsoran, and a charge upon his successor in the benefice; household furniture, &c., and likewise certain annuities or rent charges, and policies of insurance, as set forth in the following instruments.

By an indenture of the 20th of February, 1822, made between the Earl of Rathdown of the first part, the testator of the second part, and a trustee of the third part, after reciting that the Earl of Rathdown was seised for life of certain lands in the county of Wexford, and that the testator had agreed with him for the purchase of an annuity of 89*l.* 18*s.* 9*d.* to be charged upon the said premises for the life of the said earl; and that the said earl had agreed to execute his bond in the penal sum of 2,000*l.*, not only to secure the punctual payment of the said annuity, but likewise to stand as a security, lest the said earl should do any act to invalidate a certain policy, effected by Robert Allen [\*274] with the \*Royal Exchange Assurance Company, on the life of the said earl, for the principal sum of 500*l.*, (and which was recited to have been assigned to the testator by

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the said Robert Allen, by a cotemporaneous deed), and also a certain other policy effected by the testator on the life of the said earl, for the like sum of 500*l.*, with the said company, the said deed witnessed that in consideration of 1,000*l.* paid by the testator, 500*l.* thereof being paid to the said Robert Allen, on the assignment of the said policy, as and for the proper debt of the said earl, and the other 500*l.* being paid to the said earl himself, the said earl granted to the testator, his executors, &c., an annuity or rent charge of 8*l.* 18*s.* 9*d.* out of all the said lands, for and during the life of the said earl. Then followed the usual clause of distress and entry, and a term of ninety-nine years was created in order that the trustee might, in case default should be made in the payment of the said annuity, raise and levy the amount thereof by sale or mortgage of the lands comprised therein. There was also a further provision, that in case the said earl should do any act to invalidate either of the said policies, so that the said two sums of 500*l.* should not be recoverable, that then the said sums should be a charge upon the said lands, and that the testator should have power to raise the amount thereof by sale or mortgage of the lands and premises. And, lastly, after reciting that the said two sums of 500*l.*, secured by the said two policies, would not become payable until the expiration of three months from the decease of the said earl, and that the testator would have to pay a sum \*of 14*l.* 5*s.* [\*275] on the 20th of August then next ensuing, being the amount of one year's premium, payable on the second policy of insurance so effected by the said Robert Allen, it was further agreed by the parties, that the deed of annuity, and the bond executed as a collateral security therewith, should remain in full force and effect until the testator should be reimbursed the amount of the interest, at the rate of 6*l.* per cent. which should accrue due on the said two sums of 500*l.*, so secured by the said two policies, until the same should be paid to him by the said company.

On the 28th of May, 1828, the following memorandum of agreement, not under seal, was executed by the testator and the

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Earl of Rathdown, "In the event of the said Earl of Rathdown being disposed to pay in the sum of 1,000*l.*, late currency, he stands indebted to the said William Eastwood (the testator), that the said earl, previous thereto, shall and will give unto the said William Eastwood, his executors, administrators, or assigns, eighteen months' notice in writing, of such his intention; and in like manner, the said William Eastwood, his executors, administrators, and assigns, shall and will, in the event of he or they being disposed to call in the said sum of 1,000*l.*, give unto the said earl eighteen months' notice, in writing, of such his or her intention, previous to the day payment will be required."

The amount of the annuity was exactly equal to the  
[\*276] \*interest on the purchase money of 1,000*l.* at 6 per cent.,  
and the annual premiums payable on foot of the two  
policies for 500*l.* each.

The testator was also possessed of two other policies of insurance, one effected by himself, on the 15th of May, 1827, with the National Assurance Company of Ireland, for the sum of 200*l.*, on the life of one P. Reilly, to secure the purchase money of a freehold rent charge of 20*l.* a year, granted by the said P. Reilly to the testator, and which, on the death of the testator, descended to his heir at law: one of the conditions in this policy was, that it should be void in case the interest of the testator in the life of the said P. Reilly should cease. The other policy was effected by one R. Radcliffe on his own life, for 300*l.*, and was subsequently assigned to the testator in discharge of a debt to that amount. All these several policies contained the usual provision, that the property of the respective companies should be liable to make good the sums secured by the said policies, provided the annual premiums should be regularly paid and the other conditions performed.

The testator was also seised of a rent charge of 60*l.* a year, charged on the fee simple lands of Solsboro, originally granted by S. Richards to J. Beavor, his heirs and assigns, and by him

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assigned to the testator, his executors, administrators and assigns, with power to the grantor to redeem on paying the sum of 1,000*l.* and giving six months' notice.

\*The bill was filed by Michael Phillips, the executor, [\*277] to carry the trusts of the will into effect; and the usual decree to account having been pronounced, and a reference made to the Master to report the rights and claims of the several legatees, the Master reported that the said annuity of 89*l.* 18*s.* 9*d.*, granted to the testator by the Earl of Rathdown, by the deed of February, 1822, together with the purchase money thereof, in case it should be redeemed, and the said two policies of insurance to secure the same, passed to the testator's widow under the clause by which he bequeathed to her "all his outstanding debts owing to him for arrears of tithe or otherwise."

He also found that the testator's widow was entitled for her life to the interest and dividends on the bonds, debentures and funded property, and to the absolute property therein, in case she survived Francis Eastwood, the testator's brother; and that she was also entitled for her life to the annuity or rent charge charged upon the fee simple lands of Solsboro; and that after her decease Frances Jane Tench would be entitled thereto. He further found, that the residue of the personal estate, not specifically disposed of, was the primary fund for the payment of the testator's debts and legacies, and that the debts due to him for arrears of tithe, and all his other outstanding debts, were in the next place applicable.

Francis Eastwood, the testator's brother, died the day before the report was signed, and left whatever he was \*entitled to under the will to the testator's widow, and [\*278] the cause having been revived, a consent was entered into that the report should stand as if signed after the cause was revived. Exceptions were taken to this report by the residuary legatees, who claimed to be entitled to the annuity or rent charge of 89*l.* 18*s.* 9*d.*, and the purchase money thereof in case the same

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should be redeemed, and also to the several policies of insurance, as not having been specifically disposed of by the testator's will. They also claimed the absolute interest in the bonds, debentures and funded property, after the death of the testator's widow. They further claimed to be entitled to the rent charge or annuity of 60*l.* out of the lands of Solsboro (or the interest on the purchase money thereof in case the same should be redeemed) during the life of the testator's widow, as the same was not disposed of by the will during that period, but this claim was abandoned in the course of the argument. And they likewise insisted that the fund made primarily liable for the payment of the debts and legacies, was the outstanding debts owing for arrears of tithe or otherwise.

Mr. Moore, Mr. Ball, Mr. Holmes, Mr. Stock and Mr. B. C. Lloyd, for the residuary legatees.

The Master ought not to have found that the annuity or rent charge of 89*l.* 18*s.* 9*d.*, granted by Lord Rathdown, was merely a security for a debt, or that it passed under the clause in the will, by which the testator bequeathed all his outstanding debts. The deed of \*1822 recites an agreement for the purchase, in consideration of 1,000*l.* of a regular annuity, to be secured in the usual manner. On the face of that deed, then, nothing appears from which it can be inferred that the transaction was considered by the parties as creating a debt. The subsequent memorandum of agreement which was entered into after a period of six years, although it contained a stipulation that each party should give eighteen months' notice, before the grantor could redeem the annuity, or the grantee could call for his money, yet, as it was never acted upon in the testator's lifetime, the annuity continued a perfect annuity, or at least must have been so considered by him when he made his will; besides, this document not being under seal, cannot control or vary the legal effect of the deed; and if, at the time of the testator's death, it continued an annuity, there are no words in the will under which it can pass. The testator, in the previous part

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of his will, had enumerated and disposed of his property in detail, with great minuteness, among which were his bonds and debts; when, therefore, in a subsequent part, he speaks of debts for "tithe or otherwise," the latter words cannot be held to apply to debts generally, but must be confined to debts *ejusdem generis*, *Hotham v. Sutton*.(a) In *Stenhouse v. Mitchell*,(b) Lord Eldon was of opinion that a judgment debt would not have passed under the words debts due, whether by bonds or mortgages or open accounts, had it not been for a larger intention disclosed \*in another part of the will. The annuity could not, in [\*280] any sense of the word, be said to be a debt "owing" to the testator.

The report is also erroneous in finding that the four several policies of insurance have passed under the words "outstanding debts" owing to the testator. A policy is a mere contract of indemnity, and if the debt be paid, the policy will cease, *Godsall v. Boldero*.(c) It is, in all events, at most, a contingent debt, which will not be payable if any of the conditions mentioned in the instrument are violated. The word "debentures" cannot comprehend these policies. A debenture is merely a certificate showing that money is due, and not a contract creating a debt, by virtue of which the debt can be enforced: besides, the words under which the testator bequeaths his debentures are, "the legal interest on bonds, debentures, &c.," expressly confining the bequest to a species of property bearing interest.

The Master is wrong in finding that the testator's widow is entitled to the absolute interest in the bonds, debentures and funded property, upon the contingency (which has happened) of her surviving Francis Eastwood. It must be admitted, that where the interest of a fund is bequeathed, without limitation as to continuance, the principle will pass also. But here there is a bequest over to F. Eastwood, of the "interest of money," which can only \*refer to the bonds, debentures, &c., [\*281] which shows the intention of the testator to give his

(a) 15 Ves. 319.

(b) 11 Ves. 356.

(c) 9 East. 72:



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widow a life estate only, and as Francis Eastwood has died in her lifetime, the legacy to him has lapsed.

The Master is also wrong in not finding that the outstanding debts due to the testator are the primary fund for the payment of his debts and legacies; that fund was bequeathed to the widow, expressly subject to the debts and legacies, and therefore is applicable, in the first instance, in exoneration of the residue. This is not a conflict between the real and personal estate, or an attempt to make a new fund answerable, which was not so before, but as between two funds, both equally liable, the testator has merely indicated which was to be first resorted to, *Choat v. Yeats*.<sup>(a)</sup> The codicil is also confirmatory of this view, for by it a legacy is bequeathed to Miss F. J. Tench, to be paid to her after the widow's death; why should the testator postpone the payment of that legacy, except to exempt the widow from a portion of the burden he had imposed upon her, viz., the payment of his debts and legacies.

The *Attorney-General*, Mr. Warren and Mr. Wm. Brooke, for Mary Eastwood, the testator's widow.

The annuity is exactly equal to the amount of the annual premiums on the policies, and the interest of the purchase [\*282] \*money, at six per cent., from which it is plain that it was only intended as a security for money. In all events, the subsequent memorandum, which contains a provision for redemption, has clearly converted the transaction into a mere loan; and, as, in the memorandum, Lord Rathdown is described as indebted to the testator, it shows the light in which the dealing was viewed by the parties, and there is no reason to suppose that the testator, at the time of making his will, did not regard it in the same light. As to the two policies by which the loan was secured, they must pass along with the annuity; for if Lord Rathdown should pay off the debt, the policies will belong to

(a) 1 J. & W. 102. See also *Brown v. Groombridge*, 4 Mad. 495.

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him, *Holland v. Smith*.<sup>(a)</sup> As to the two other policies, they will pass either as debentures or debts; they are debts payable on a certain event, although the period at which the payment is to be made is uncertain. In *Essington v. Vashon*,<sup>(b)</sup> under the word debts, a bond to secure a contingent debt passed. Suppose an insurance broker to have effected an insurance on a life, for his own benefit, with another office, and also to have insured the same life, himself, on behalf of a third party, and then to have died, would not that person be entitled to recover the amount of the policy, as a debt, out of the assets of the broker? and is a different construction to be put on this word, when the executors of the broker are to receive the money? There is no bequest to the residuary legatees, but the testator merely appointed them to take what \*by possibility, might remain undis- [\*283] posed of. As to the bonds, debentures, &c., the widow is absolutely entitled to them; as it is now quite settled that a bequest of the interest will carry the principal also; besides the bequest over to Francis Eastwood, of what she does not dispose of, is void for uncertainty, *Malim v. Keighley*.<sup>(c)</sup> The residue is the primary fund for the payment of the debts and legacies; the words "subject to," in the bequest to the widow, will not have the effect of making that fund primarily liable. The testator could not have intended that his debts and legacies should be paid, in the first instance, out of a fund composed of choses in action, and which might not have been available for a number of years. The word "subject" does not exonerate the residue, but merely makes the specific bequest an auxiliary fund, *Holford v. Wood*,<sup>(d)</sup> the phrase used in the case of *Choat v. Yeats* is "after," which is much more significant than the word "subject," and implies that the testator intended to give to the legatee only so much as remained after the payment of the debts out of the legacy.

Mr. Ball, in reply: The testator was possessed of Government and Wexford-bridge debentures; there is, therefore, no

(a) 6 Esp. 11.

(b) 3 Mer. 434.

(c) 2 Ves. Jun. 529.

(d) 4 Ves. 486.

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necessity to strain the meaning of the word debenture in order to make it include the policies. The case of *Essington v. Vashon* does not apply; there the debt was not contingent, the [\*284] \*condition of the bond having been broken. As to the bonds, debentures, &c., although it must be admitted, that in general a bequest of the interest will carry the principal, yet such a bequest may be explained by the context of the will. In this case, where the testator intended an absolute legacy, he has distinctly expressed it. The words, "whatever she does not dispose of," in the bequest over to Francis Eastwood, do not make it uncertain, as they do not apply to the whole of the gift to him, but must be confined merely to the household furniture, &c., which were left to the widow, by a former clause, to be used and disposed of as she thought proper.

16th February.—THE LORD CHANCELLOR:—This will lies in a small compass, although there is considerable difficulty in giving a rational construction to all its parts. The testator begins by devising the rents of his freehold estates of Drombilly, and all arrears of rent, to his wife during her life; he then proceeds to devise to her his Wexford estate, for her life, and I do not find that he makes any disposition of it after her life estate; he bequeaths to her the legal interest on his bonds, debentures and funded property; he then gives her an absolute interest in his household furniture, &c., and his outstanding debts; subject, however, to his debts and legacies; and he also gives her his ready money in bank. There is, then, a distinct clause, that if his brother Francis should survive her, he should inherit and enjoy the rents of Drombilly, interest of money, and what [\*285] ever \*belongs to her, that she does not dispose of. He then directs that Robert Murphy, who was married to his niece should, inherit his property in Drombilly, which he wishes should go to one of their children in preference to the others. He appoints Michael Phillips his executor, and gives him a pecuniary legacy for his trouble; and nominates James Eastwood and Robert Murphy "his residuary legatees." By a codicil, he gave a rent charge of 60*l.* a year to Miss F. J. Tench,

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after the death of his wife : a question arose upon this gift, but as the residuary legatees have abandoned their claims to this annuity, I have nothing to do with it. The only other point in the codicil arises from his having given to Miss F. J. Tench 500*l.*, to be paid to her after the death of his wife ; from which a fair inference was drawn, that it was the intention of the testator that the debts and legacies should be paid out of the fund given to his wife.

The first point for me to decide is, whether certain policies, and a certain annuity, granted by Lord Rathdown to the testator, did or did not pass, under the will, to the wife. Two of the policies were for securing 1,000*l.* on Lord Rathdown's life ; another for securing an annuity, which does not pass to the wife, therefore it is a distinct independent security ; the remaining policy was accepted for the extinction of a debt, and it may be fairly argued that it stands in the place of the debt.

I have read the papers with great care, and particularly \*those relating to the annuity granted by Lord Rathdown ; and I am clearly of opinion, upon the whole of that transaction, that the deed and memorandum, taken together, amount to a security only for the sum of 1,000*l.* on the estate of the grantor, paying interest at the rate of 6*l.* per cent., together with the annual premiums for keeping up the policies.(a)

The deed, after reciting the agreement for the purchase of an annuity(b) by the testator, proceeded in the usual form, in consideration of 1,000*l.*, to grant a regular annuity of 89*l.* 18*s.* 9*d.* with the usual clause of distress and entry, and a term of ninety-nine years is created to secure it. This was a contract for the payment of an annuity, and did not create a debt. If the deed had stopped here, I should have had no doubt that it was a regular annuity deed. Now the precise annuity granted is the aggregate

(a) See *Stokes v. Verrier*, 3 Swan. 634 ; *Longuet v. Scawen*, 1 Ves. Sen. 402.

(b) There is no Act in Ireland to correspond with the English Annuity Act of the 17 G. 3, c. 26, nor does the 53 Geo. 3, c. 141, Eng. extend to this country.

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of the legal interest on the 1,000*l.*, and the amount of the premiums. An ordinary way to secure a sum of money on the estate of a tenant for life would be, by making it binding on a tenant for life to pay out of his life estate, the legal interest on the sum advanced, and the premiums of a policy, so as to insure the repayment of the principal by supplies from the life estate.

[\*287] \*The deed recites two policies, and then there is this provision. In case the earl should do anything to make void either of the said policies, then it should be lawful for the said W. E., his executors, administrators and assigns, to levy the said sum of 1,000*l.* with the said annuity of 89*l.* 18*s.* 9*d.* until the said sum of 1,000*l.* should be paid off by sale or mortgage of the said lands and premises; and then comes this stipulation—that as the amount secured by the two policies would not be payable for three months after the decease of the Earl of Rathdown, the interest on the 1,000*l.* should be paid up for that period: and there is also a provision for the payment of a fractional part of the premium. The grant of the annuity as such, and the loan of the 1,000*l.*, are confounded by the want of skill in the draftsman. The true construction, however, is this, I will lend you a 1,000*l.*, but you are to provide funds to secure both the principal and interest, and if you comply with the conditions, I will not call it in during your lifetime.

Formerly it was thought, that if there were a power on the part of the grantor to redeem, and more than the legal interest were reserved by the deed, it would make it usurious,<sup>(a)</sup>

[\*288] and consequently the power of repurchasing was \*left out of annuity deeds: when it was discovered that the transaction with such a power was legal, in some cases where there was an agreement to insert such a power, but the parties

(a) *Lawley v. Hooper*, 3 Atk. 279; *Floyer v. Sherard*, Amb. 19. As to what will make the contract usurious, see *Murray v. Harding*, 2 Wm. Bl. 859, S. C. 3 Wils. 390; *Carbery v. Weston*, 1 B. P. C. Ed. Toml. 429; *Verner v. Winstanley*, 2 Sch. & Lef. 394; *Holland v. Pelham*, 1 Tyrw. 443, S. C. 1 C. & J. 580; *Ex parte Naish* 7 Bing. 150; *Trench v. Morgan*, Batty, 254; *Byrne v. Kenniffeck*, ibid. 269.

had omitted to do so from an apprehension that it would vitiate the transaction, bills were filed for the purpose of having the power inserted, but the court said, No—we cannot supply what was purposely omitted.(a) Here, however, the transaction is of a different nature. The memorandum clearly shows the intention of the parties. [His Lordship here read the memorandum.] That shows more strongly even than the deed the intention of the parties; both assume it to be a debt, and the memorandum provides that either may be at liberty to put an end to the annuity, the one by redeeming, the other by calling in his money upon giving eighteen months' notice.

There is a passage in the will which has been struck out, but as it has been referred to by the codicil, I think I am at liberty to refer to it now. The testator bequeaths to D. and E. Keene a sum of 435*l.* 17*s.* 10*d.*, due to him for dilapidations, instead of a bond for 500*l.* passed by the Earl of Rathdown, and given to them in the former part of the will, as being part of the debt due by him. That bears upon this question. I decide this point upon the simple ground of the intention of the parties, to be \*collected from the whole of the instruments; and [\*289] I am of opinion that the annuity deed and memorandum, and the whole transaction, amount to a security only for a debt which passes with the securities under the terms of the will.

A question has been raised, whether Lord Rathdown would be entitled to the policies if he paid off the 1,000*l.* I think he would. In the case of *Holland v. Smyth*,(b) cited at the bar, the debtor being charged in account with the premiums, it was held that he was entitled to the policy when the debt was paid off. That could admit of no doubt. *Ex parte Andrews*,(c) goes further; a sum of money payable on the contingency of A. surviving B. was assigned by a debtor to his creditor to secure the debt due. The assignee, without any authority, and out of his own

(a) *Irham v. Child*, 1 B. G. C. 412; *Portmore v. Morris*, 2 B. G. C. 219.

(b) 6 Esp. 11.

(c) 2 Rose, 410.

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funds, insured the life of A., who died, and the sums assured were received, and the *Vice-Chancellor* held, that they must be brought into the account. That goes infinitely beyond this case: for here the creditor was authorized to insure, and the debtor furnished funds to pay the premiums, and, therefore, I think that if the debt is satisfied in his lifetime he will be entitled to the policies, and that strengthens my view of the case. I think then that both this annuity and the policies pass under the will.

That, however, does not relieve me from deciding the  
 [\*290] \*general question, as there are two other policies, one to secure the price of an annuity which goes to the heir at law, and the other a general policy; and the question is, whether these pass under the will? One of these policies is with the National Assurance Company of Ireland, and I find in it a clause, that if the interest of Mr. Eastwood in the life of P. Reilly should cease, the policy should be void.(a) The person who has now the interest in the life has not the policy, and he who has the policy has no interest in the life. It, therefore, may be a question whether the policy has not ceased; and probably my decision upon this point may not be important to the parties.

Now what was the intention of the parties as to the policies? as between the insurance office and the insured, the policy of insurance is only a contract of indemnity; but as between man and man it is generally treated as an additional permanent security. There may be various sorts of policies; a man has an interest in his own life and may insure it, that is in effect a contract with the office to have a sum of money paid at his death. The character of an insurance by way of indemnity is to provide for the case where the party may sustain a loss. But where the object is to secure a debt or a sum of money in the nature of a loan, there it is in the hands of the creditor, and as between him  
 [\*291] and the debtor, in the nature of an additional \*security for the debt. *Godsall v. Boldero*(b) decided that the

(a) There is no Act in Ireland against wagering policies similar to the 14 G. 3, c. 48, Eng.

(b) 9 East. 72.

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money could not be recovered from the office, if the debt were paid *aliunde*, but the offices have not found it to be for their benefit to act on the rigid rule, and I believe they generally pay without inquiry. In effect, therefore, a policy on the life of a debtor is a security for a sum to be paid, and the creditor knows no distinction, but looks to all his securities taken together as the means of repayment. The former of these policies was to secure a sum advanced for the purchase of an annuity; the object was to bring back that sum to his assets. The other was in lieu of a debt that was owing to him.

Are there words in the will sufficient to pass these policies? I must look to the whole context of the will and the intent of the testator; he gives to his wife the legal interest on his bonds, debentures and funded property, and all his outstanding debts for arrears of tithes or otherwise, subject, nevertheless, to his debts, funeral expenses and legacies: the insertion of these words, "subject to, &c.," in this part of his will, shows that the testator was dealing with the mass of his property; and it is impossible to doubt his intention to pass these securities. Are the words sufficient? I think they will pass in this particular case either as debentures or debts. It is argued they do not pass as debentures, as they do not bear legal interest. Suppose a bond not payable for a year, and not \*carrying interest, [\*292] can anybody say that that would not pass? The question is, what is the meaning of the term "debenture?" Counsel in reply stated a fact with which I was not previously acquainted, namely, that there are debentures to which the testator was entitled, viz., a government debenture, and two Wexford-bridge debentures, which increases the difficulty in extending the word to policies; but I am of opinion that the policies are debentures, and there is no reason why they should not pass as well as the others; there is no magic in words. A debenture is an acknowledgment or declaration of a present or future right to receive payment of a certain sum out of a given property, so as not to make the person issuing it personally responsible. The form of a government debenture is this. "This is to certify



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that A. B. is entitled to a certain sum," &c., What is a policy? Nothing but an engagement by the directors that the funds of the company are liable to pay a certain sum of money on a given event; it is, therefore, within the meaning of the word debenture; it is not to be paid unless a certain person die and except certain annual payments are made, and other conditions are complied with. Now there is no uncertainty about the event of death, except as to the time when it is to happen, and it can make no difference with regard to the instrument, whether it is an agreement that the funds shall pay a certain sum on a given event, or a sum in all events.

I bring them, therefore, within the meaning of these words, "bonds, *debentures*, and funded property." I think the [\*298] \*words admit of that construction, looking at the meaning of the testator in this case; but supposing I am wrong in that view, will they pass under the words outstanding debts? There is a difficulty in saying there was a debt "owing" to the testator; it was no debt properly speaking, but merely a liability as regards the property, not the person, unless the property should be withdrawn from the liability. I must not, however, take the sentence by itself, but the whole clause together.

Mr. Warren supposes the case of a policy broker who had effected an insurance on a life with another, and had insured the same life himself on behalf of another, and then died, so that his assets would have both to pay and receive when the same event happened, and he asks, would not these words in his will compel the wife to pay the sum assured by the testator (which they clearly would), and, if so, must not the right to receive the sum assured to him pass by the same words? I was very much struck with this argument; however, there is some difficulty in saying that the policies are debts "owing;" yet still they are such in a certain sense, they are an obligation that the sum shall be paid upon the event happening. The testator meant to enumerate debts of every nature; and, therefore, taking the whole of the will together, I am of opinion that the two policies do pass to the

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wife; but I do not decide the abstract point that a simple gift of debts will pass a policy of assurance. *Essington v. Vashon*(a) \*was merely a conflict between two gifts, and \*[294] the question there was, whether the bond was to be taken as stock or to pass as a debt: it does not bear on this case.

I have great difficulty in deciding which is the fund primarily liable to the payment of the debts and legacies. I have no doubt that in appointing residuary legatees, the testator merely meant to dispose of any little surplus that should remain. It appears to me, however, on the best consideration I can give to the point, and considering the part of the will in which I find the payment of the debts charged, that the outstanding debts are the primary fund. In *Holford v. Wood*,(b) which at first might seem an authority the other way, there was no gift of the residue. In *Choat v. Yeates*,(c) although it differs in some respects from the present case, yet as the appointment of a residuary legatee is just as efficacious as a general residuary bequest, I consider it an authority for the decision I have come to; and I find no reason to quarrel with that case. But that very circumstance entitles me to give the largest construction I can to the terms, "outstanding debts," and to hold that the testator meant to include debts of every nature. He gives her his household furniture, &c., and there being large debts due to him, he says, I give her my outstanding debts, subject to my debts; and then he gives her the ready money which is not subjected to the payment of his debts: he intended that she should have it as a clear fund, and consequently between those two \*funds she meant that [\*295] the debts should be the primary fund. Take the case of a real estate, the descended estate must be first applied, then the devised one.(a) But even as to real estate, if the devised estate is selected and appropriated to the payment of the debts, it will be applied before the residue of the real estate which de-

(a) 3 Mer. 434.

(b) 4 Ves. 76.

(c) 1 Jac. &amp; W. 102.

(d) *Galton v. Hancock*, 2 Atk. 430; *Powis v. Corbet*, 3 Atk. 556; *Chaplin v. Chaplin*, 3 P. Wms. 367; *Davies v. Topp*, 2 B. C. C. 259, n.; *Williams v. Chitty*, 3 Ves. 545.

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scends to the heir on intestacy.(a) I have not come to  
 [\*296] this conclusion without \*much difficulty, and with a great  
 inclination to throw the debts on the residuary fund.

The last question is, not whether the gift of the legal interest on the bonds, debentures and funded property carries the principal,(b) which admits of no doubt, but whether the absolute interest is cut down by the gift over? It is said that the bequest of the interest over to Francis Eastwood, in case he survived the wife, reduced her to a life interest, and as the event did not happen, the residuary legatees contend that it is a lapsed legacy. Now, as the words in the first part of the will are sufficient to pass the principal, this case is stronger than most of the decided cases, for here the testator has expressly confined the wife to

(a) *Donne v. Lewis*, 2 B. C. C. 257; *Manning v. Spooner*, 3 Ves. 114; *Harwood v. Oglander*, 8 Ves. 124; *Milnes v. Slater*, ib. 303. But a mere charge of debts and legacies upon a devised estate will not protect a descended estate from being first applied; ib. 306; *Barnwell v. Clowdor*, 3 Mad. 453. Nor will a general charge of pecuniary legacies upon real estate affect an estate specifically devised; *Spong v. Spong*, 3 Bli. N. S. 84, 105, overruling *Exchequer*, 1 Y. & J. 300. As to personal estate it is now settled, that though express words are not necessary to exonerate it, yet there must appear from the entire of the will an intention, not merely to charge the real estate, but so to charge it as to exempt the personal; *Bootle v. Blundel*, 1 Mer. 230; *Gittins v. Steele*, 1 Swans. 24; *Greene v. Greene*, 4 Mad. 148; *Mitchell v. Mitchell*, 5 Mad. 69; *Rhodes v. Rudge*, 1 Sim. 79; *Selby v. Rockcliffe*, 1 Russ. & M. 571; *Driver v. Ferrand*, ib. 681; *Chutterbuck v. Chutterbuck*, 1 Mylne & Keen, 15; *Walker v. Hardwick*, ib. 396. And circumstances *dehors* the will ought not to be called in to assist the explanation; *Brummel v. Prothero*, 3 Ves. 113; 1 Mer. 216. But when a charge affecting the real estate is not the proper debt of the deceased himself, his heir or devisee is not entitled to have it paid out of the personal estate; *Bagot v. Oughton*, 1 P. Wms. 347; *Evelyn v. Evelyn*, 2 P. Wms. 664, and the cases in the note to that case; *Lewis v. Nangle*, Amb. 150; *Lawson v. Hunter*, 1 Bro. C. C. 58; *Ancaster v. Meyer*, ib. 454; *Tweddell v. Tweddell*, 2 Bro. C. C. 101; *Billinghurst v. Walker*, ib. 604; *Tankerville v. Fawcett*, 1 Cox, 237; *Bassel v. Percival*, ib. 268; *Hamilton v. Worley*, 2 Ves. Jun. 62; S. C. 4 Bro. C. C. 199; *Scott v. Beecher*, 5 Mad. 96; *Noel v. Noel*, 12 Pri. 213; unless he has made the debt his own; *Parsons v. Freeman*, Amb. 115; *Woods v. Huntingford*, 3 Ves. 123; *Buller v. Butler*, 5 Ves. 539; *Waring v. Ward*, 7 Ves. 332; *Oxford v. Rodney*, 14 Ves. 417.

(a) See *Elton v. Shephard*, 1 Bro. C. C. 532; *Philips v. Chamberlaine*, 4 Ves. 51; *Rawlings v. Jennings*, 13 Ves. 39; *Paige v. Leapingwell*, 18 Ves. 463; *Adams v. Armitage*, 19 Ves. 418; S. C. Coop. 283; *Stretch v. Watkins*, 1 Mad. 253; *Clough v. Wynne*, 2 Mad. 188; *Halg v. Swiney*, 1 Sim. & Stu. 437. *Benson v. Whittam*, 5 Sim. 22.

a life estate in other property, where he intended to give  
 \*a life estate only. The gift over does not affect the [\*297]  
 previous gift; it was not to take effect except in a con-  
 tingent event, and an intention to cut down a bequest cannot  
 be collected from a devise over beyond what is necessary, to give  
 effect to that devise over. And I do not find that in any part of  
 the will he disposes of the money in the event of Francis not  
 surviving. I am of opinion that there is no gift over in the event  
 which has happened, and therefore that the general bequest to  
 the wife never was divested. There are several cases that decide  
 the point; *Harrison v. Foreman*; (a) *Smither v. Willock*. (b) I  
 think that the gift to the wife is absolute and not cut down by  
 the subsequent bequest.

But supposing even that the contingency had happened,  
 yet the bequest over would have been uncertain, and therefore  
 void. I am asked to refer these words, "that she does not dis-  
 pose of," to the household furniture, &c., in the former part of  
 the will, but the testator speaks here generally, and he must  
 mean whatever belongs to her under his will, and nothing is  
 given over, but what she does not dispose of. In *Malim v.*  
*Keighley*, (c) Lord Roslyn lays down what is necessary to consti-  
 tute a valid bequest. There must be a certain subject, and if not,  
 the gift over cannot take effect; here if the legatee filed  
 a bill \*to have the fund secured, what fund must I se- [\*298]  
 cure? As much as she should not dispose of; she has a  
 right to dispose of the whole, and if she should say it is my will  
 to dispose of all, there would be nothing to secure, therefore, the  
 gift over is void. In the case referred to, Lord Roslyn observed,  
 that perhaps the determination of *Upwell v. Halsey* (d) might be  
 very much doubted; that case is, I think, overruled by *Wynne*  
*v. Hawkins*, (e) *Strange v. Barnard*, (g) and *Pushman v. Fildier*. (h)  
 The rule is clearly settled by those authorities. (i)

(a) 5 Ves. 207. (b) 9 Ves. 233. See the note to *Bergin v. Woodlock*, ante, p. 144.

(c) 2 Ves. Jun. 532.

(e) 1 Bro. C. C. 179.

(h) 3 Ves. 7.

(d) 1 P. Wms. 661.

(g) 2 Bro. C. C. 585.

(i) And see the note to *Lawless v. Shaw*, ante, p. 176.

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In the Matter of Anne Walker.

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[\*299] \*ANNE WALKER, A MINOR, BY STEWART KING,  
HER GUARDIAN, *v.* ELIZABETH WHEELER AND  
OTHERS. HENRY WALKER, A MINOR, BY JOHN DUGGAN,  
HIS NEXT FRIEND, *v.* ELIZABETH WHEELER AND OTHERS.  
THOMAS HODGENS AND ANNE HODGENS, OTHERWISE  
WALKER, HIS WIFE, *v.* ELIZABETH WHEELER AND OTHERS.  
IN THE MATTER OF ANNE WALKER, LATE A MINOR.(a)

1835: 19th February.

A ward of court, entitled, in her own right, to large real and personal property, was married under age, and without the consent of the court, which marriage was subsequently annulled. Upon her coming of age the husband petitioned to be at liberty to make proposals for a settlement of the ward's property, and to have a legal marriage celebrated, undertaking to execute such settlement as the court should direct. Proposals having been laid before the Master, he approved of a draft settlement, whereby all her property was limited to her for life, for her sole and separate use, and afterwards to her children; but the Chancellor declined making any order as to the execution of this settlement, the amount of the property then in litigation not being ascertained. A second marriage having been celebrated by direction of the court, there was issue thereof two children. The wife subsequently eloped. Held—that the children had no right, during the life of their mother, to be maintained out of her separate estate. Held, also—that the proposed settlement, though not executed, having been acted upon by the court by different orders, could not be varied.

If the court gets a control over the property which belonged to the wife before marriage, her right to a settlement is preserved, except she comes into court to waive that right.

The wife, by appearing in court, may waive her right to a settlement, in which case no provision is made for the children.

In cases of contempt the rule is to exclude the husband entirely from the wife's property. But where the contempt is not very flagitious, a portion is sometimes, though rarely, given to the husband during coverture.

The husband does not forfeit his estate by the curtesy, nor the wife her jointure by adultery.

The court has not power generally to provide an alimony for the wife's separate use, but if the court has a continuing power over the wife's own property, it will seize on it to maintain her during desertion. Even where there is no contempt or misconduct, the children can only be entitled under and after their mother: they have

(a) Reversed; Lloyd & G. t. Plunk. 136; but Lord Plunket's decree reversed by House of Lords, Id. 533.

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In the Matter of Anne Walker.

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no independent right. And where there is a contempt, the husband is excluded as against the wife altogether, and generally as against the children also.

The court cannot on account of the misconduct of the wife, provide for the children out of her separate property.

THE facts of this case, as they appeared upon the several affidavits, are as follows: Anne Walker, afterwards Mrs. \*Hodgens, being upon the death of her uncle, Thomas [\*300] Walker, entitled to a large property as his heiress at law and next of kin, was made a ward of court at a very early age, and was afterwards put to the school of a Mrs. M'Dermott in Grenville street. In March, 1820, and when the minor was only thirteen years of age, Mr. Thomas Hodgens, a barrister, having contrived, through the medium of her mother, to obtain access to her, carried her off to a place called the Straw Market, where he procured a marriage ceremony to be performed between them by J. Wood, a degraded clergyman. This marriage having been shortly afterwards discovered by the court, it was ordered by the Lord Chancellor that an attachment should issue against the mother, the clergyman, and the said Thomas Hodgens, and that they should be committed to close custody. Thomas Hodgens was afterwards discharged out of custody, upon his entering into security by recognizance in a sum of 20,000*l.*, not to hold any intercourse with the minor without the leave of the court. Notwithstanding this, however, the minor was afterwards, on the 21st of February, 1821, induced to go to his residence, where she was retained until the next day. In consequence of this, on the 24th of February, 1821, he was again attached and committed to custody, and on the 30th of May, 1821, having presented a petition stating that the minor had gone to his house of her own accord and without his knowledge, he was discharged, upon entering into security, by his own recognizance, not to hold any communication or correspondence whatsoever with the minor without the \*leave [\*301] of the court. On the 14th of May, 1822, while the minor was out walking in company with her schoolfellows, she was forcibly carried off by Hodgens to the house of one of his connections, and in order to evade discovery, Hodgens was put

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*In the Matter of Anne Walker.*

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on board a vessel bound to London, concealed in a provision cask, and the minor was brought on board the same evening in disguise. From London they proceeded to France, where they remained until the minor had attained her majority. For this last contempt the court made another order for an attachment against Hodgens on the 15th of May, 1822. On the 10th of December, 1822, the marriage was declared null and void by a decree of the Ecclesiastical Court. The minor having come of age in September, 1827, Hodgens returned with her to Ireland, in the following month.

On the 28th of November, 1827, Hodgens presented a petition, stating the former marriage, and that it had been annulled, and that the minor had attained her age of twenty-one years; that he and the said Anne Walker were anxious to have a valid marriage celebrated between them, and that he was willing to execute such deed of settlement of the minor's property as the court might direct, and to submit himself in every respect to the jurisdiction of the court; that he was a member of the Irish bar, and the second son of a respectable merchant, and praying for such order of reference to the Master as the court should deem most suited to the honor and interests of the said Anne [302] Walker, and thereby undertaking \*to do and perform whatever should be ordered by the court.

An order was accordingly made, that the said Hodgens should proceed to have a legal marriage duly solemnized between him and the said Anne Walker; and that he should proceed to lay proposals before the Master in the matter, for a proper marriage settlement to be entered into under the circumstances, in respect of the fortune of the said minor.

The Master made his report, bearing date the 8th of February, 1828, and found that a legal marriage having been, in obedience to the order of the 28th of November, 1827, duly solemnized between the said Hodgens and Anne Walker, the said Hodgens had laid before him proposals for a settlement of

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In the Matter of Anne Walker.

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the fortune of the said Anne, whereby he proposed that the freehold estate, of which the said Anne was then, or should at any time become seised, should be conveyed to trustees upon trust to and for the sole and separate use of the said Anne, independently of the said Hodgens, and without the same being subject to his debts, and the rents, issues and profits to be paid to the said Anne, upon her own receipt, notwithstanding her coverture, and after her decease, then to the use of the first and other sons of the marriage successively in tail male, and in default of such issue male, to the use of the daughter, if only one, in tail male, and, if more than one, to the use of all the daughters as tenants in common in \*tail, and in default of issue, then to the use of such [\*303] person, &c., as she the said Anne, by her last will and testament should appoint, and in default of such appointment to the use of her and her heirs. And as to the personal property, that the same should be vested in trustees upon trust by and out of the said property, to pay all such costs as should have been or might be necessary for the prosecution of the several suits and proceedings which had been instituted on behalf of the said Anne, or such costs as the court might decree her or the said Hodgens to pay in any suit instituted on her behalf, but in the mean time upon trust to pay the income and interest of the said property unto the said Anne, to and for her sole and separate use and benefit, free from the control, debts or engagements of the said Hodgens; and after the payment of the said costs, then, as to the residue upon trust to pay the interest and proceeds thereof unto the said Anne during her life, to and for her sole and separate use and benefit, free from the control, debts or engagements of the said Hodgens, and after her decease upon trust for all and every the child and children of the marriage, if there should be more than one, in such shares and proportions as the said Anne should appoint, and in default of such appointment to be equally divided amongst them, and if but one child then upon trust for such only child, with power, however, to the said Anne to appoint by will any portion of the said personal property, not exceeding one fifth part thereof, to the said Hodgens, in case he



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should survive her; and with power also to the said  
[\*304] Anne, in case she should survive \*the said Hodgens  
and leave any issue of the said marriage, who should be  
entitled to any benefit under said settlement, to appoint the inter-  
est of a certain proportion of said personal property, not exceed-  
ing 20,000*l.* to and for the use of any after-taken husband, and  
to appoint the principal to and amongst any children which the  
said Anne should have by any after-taken husband; but in case the  
said Anne should not leave any issue by said Hodgens, who  
should be entitled to any benefit as aforesaid, then upon trust for  
such person, &c., as the said Anne should, in the lifetime of said  
Hodgens, by her will, or after his death, either by her will or by  
any deed appoint, and in default of such appointment, then upon  
trust for her, her executors, administrators and assigns.

The Master then certified that he had approved of said propo-  
sals, and of a draft of a settlement settling and assuring the said  
property pursuant thereto, but that he had postponed the engross-  
ment of said settlement until further order. He likewise found  
that there was then depending in this court three several suits  
respecting the property of the said minor.

By an order of the 2d day of August, 1828, made in the mat-  
ter of said minor, and also in the second and third cause, it was  
ordered that the Accountant-General should from time to time  
draw on the Bank of Ireland in favor of the said Anne, upon her  
separate receipt, for the dividends and interest which should  
accrue due on the funds in court to the credit of the several  
causes.

[\*805] \*By an order of the 13th of February, 1829, made upon  
consent, the receiver was discharged from the receipt of  
the rents of the freehold estates, part of the property of the said  
Anne, who was allowed to enter into receipt of the same, as her  
separate estate.

By an order of the 10th of December, 1833, the Accountant-  
General was ordered to transfer from the credit of the first and

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second causes to the credit of the third cause, and to the separate credit of the said Anne, the sum of 5,846*l.* 3*s.* 3*d.*, old three and a half per cent. stock, and 538*l.* 12*s.* 2*d.*, new ditto, and 22,407*l.* 12*s.* 6*d.*, bank stock, and the said Accountant-General was ordered, in execution of the order of the 2d of August, 1828, from time to time to draw on the Bank of Ireland in favor of the said Anne, on her separate receipt, for the dividends which should accrue due on the said several sums, when the same should be so transferred.

By an order, bearing date the 22d of April, 1834, made on the petition of Anne Hodgins, which stated the several matters hereinbefore mentioned, and that said settlement had been engrossed, blanks being left for the names of the trustees, but that same had not since been executed, and that she (the said Anne) had not as yet been discharged from the wardship of the court, and that her personal property was still under the control of the court, except certain parts thereof which had been applied, under the orders of the court, in payment of certain claims thereon, \*and that by said orders which provided for the payment [\*306] of said several sums out of the fund in court, the amount of the personal property which was the subject of said settlement, had been reduced, but that there remained a very considerable personal estate still under the control of the court; that the said Thomas Hodgins had not executed said settlement; that there was issue of the marriage between her and said Thomas Hodgins two sons, both of whom were born since the second marriage, and the approval of the said deed of settlement, and since the report of the 8th February, 1828; that she (the said Anne) was advised that it was most material and necessary, and for the benefit of her and her children, that said settlement should be executed, and she submitted to the consideration of the court, whether it was necessary that any alteration should be made in the recitals thereof, with reference to the reduction of the funds therein mentioned, since the approval thereof by the Master, but stated she was advised that such alteration was not necessary, if said settlement was to be (as she submitted to the court it should

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be) dated as of the day on which it was approved of by the Master, as said settlement in terms provided for payment out of said personal estate of any demand thereon for costs or otherwise, in pursuance of which provision some of said orders had been since made; and that, pursuant to an order of the court, of the 30th April, 1834, the said Thomas Hodgens had joined her in levying fines of the freehold property; and then prayed that said Thomas Hodgens might execute said settlement, with such alterations therein, with respect to

[\*307] \*the amount of her (the said Anne's) property (if any), as the Master might certify to be proper and necessary, and in consequence of the aforesaid orders, or any of them; and that it might be referred to said Master to inspect said settlement and orders, and to certify whether any, and what alterations should be made therein, in consequence of said orders; and that he also might be directed to approve of proper trustees to be named in said settlement, and that such proceedings might be had, without prejudice, if necessary, to said orders of the 2d August, 1828, of the 13th February, 1829, and of the 10th December, 1833; it was ordered by the Master of the Rolls (amongst other things), that the Master in the matter should be at liberty to review his said report of the 8th day of February, 1828, and the draft of the marriage settlement therein mentioned, and in reviewing the same, it was further ordered, that the Master should report the funds to be thereby vested in and conveyed to trustees, having regard to the orders of the 2d August, 1828, the 13th February, 1829, and the 10th December, 1833, and in relation to any other funds to be included in, and vested in trustees by the said settlement; and that the said Master should report and approve of proper persons to be appointed trustees under the said settlement; and that said Master should amend the draft of the said settlement, by declaring and limiting the uses of the fines levied in the last term of the freehold property mentioned in the said report, and that in consequence of the contempts committed by the said Thomas Hodgens, that the said Master, [\*308] \*in settling and approving of the draft of the said settlement, should provide, by effectual provisions and

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limitations, to exclude the said Thomas Hodgens from any present, future, or contingent interest in the property, real or personal, of the said Anne his wife, or any part thereof, save and except so far as the draft, as mentioned in the report of the Master, enables the said Anne, by virtue of the power therein mentioned, to make an appointment in the events therein mentioned, in favor of the said Thomas Hodgens, of a portion of her personal property, not exceeding one fifth; and that the Master, in settling and approving of the draft of the said settlement, should exclude the said Thomas Hodgens from any participation, benefit or advantage, right or interest in the property of the said Anne, real or personal, future or contingent, save under the appointment to be made as aforesaid, of her personal property not exceeding one fifth; and that the Master should amend the draft of the said settlement, as mentioned in the said report, which provides, "that in case the said Anne shall not leave any issue by the said Thomas Hodgens, who shall become entitled to any benefit, as provided in the said draft, then in trust for such person or persons, and in such shares and proportions, as the said Anne shall, in the lifetime of the said Thomas Hodgens, by her will or after his death, either by her will or by any deed to be by her executed in the presence of and attested by two or more credible witnesses, direct and appoint; and in default of such appointment, then in trust for the said Anne, her executors, administrators and assigns," by providing \*that in [\*309] default of such appointment, that the personal property should be limited, upon trust, for the said Anne and her next of kin, to the express exclusion of the said Thomas Hodgens, his executors and administrators. And that the Accountant-General of the court should continue to act in pursuance of the said order of the 10th December, 1833, and continue to draw in favor of the said Anne, for the dividends which should accrue due from time to time upon the funds therein mentioned, and thereby ordered to be placed to her separate credit, as mentioned in the said order of the 10th December, 1833, on her separate receipt, until further order; and in like manner, that the said Anne should be at liberty to continue to receive the rents and

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profits of the freehold property as her separate estate, until further order.

There was issue of the marriage between Mr. and Mrs. Hodgens two children, both of whom were born after the second marriage. In the month of May, 1834, Mrs. Hodgens eloped from the residence of her husband with a Mr. Mahon, and in the following Michaelmas term, Mr. Hodgens brought an action against Mr. Mahon, for *crim. con.*, and obtained a verdict for 3,000*l*. damages.

On the 12th of January, 1835, Hodgens presented a petition on the part of his infant children, as their next friend, praying that in proceeding under the order of reference of the 22d day of April, 1834, the Master might amend the draft of the [\*310] said settlement, by providing \*out of the income of the property of the said Anne Hodgens, during her life, a competent sum to him, the said Hodgens, for the maintenance, clothing and education of his children during their minority, and likewise a competent sum to be paid to them after they shall attain the age of twenty-one years, for their support and advancement in life; and that he might further amend the said draft in reference to the disposition of the residue of the income of the property of the said Anne Hodgens during her life, in such manner as the court should deem meet, under the circumstances of the case; and that in the meantime the execution of the said orders of the 2d August, 1828, 10th December, 1833, 22d April, 1834, and 13th February, 1829, so far as the same empowered the said Anne Hodgens to receive, on her separate receipt, and as her separate estate, the interest and dividends, rents and profits of the said funds and freehold property respectively, might be suspended, and that the said Anne Hodgens might be restrained from receiving the same. Whereupon it was ordered by the Master of the Rolls, that any payments under the said orders should be stayed until further order.

On the 26th of January, 1835, the matter of the said petition

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being again moved before the Master of the Rolls, his Honor made the following order :

"It appearing to the court that the order, bearing date the 28th day of November, 1827, was made by the then Lord Chancellor against the said Thomas Hodgens, then \*and still in contempt, under the three orders for attach- [\*311] ments for distinct contempts in relation to the said Anne Walker, as a ward of the court, bearing date respectively the 1st day of May, 1820, the 24th day of February, 1821, and the 18th day of May, 1822, upon his submission, stated in said order, to execute such deed of settlement as his Lordship should direct, and to submit himself in every respect to the jurisdiction of the court, and that the jurisdiction was exercised, and said order made in relation to the marital rights of the said Thomas Hodgens, in the fortune of the said Anne Hodgens, as against a person liable to the jurisdiction of the court under the said contempts, and that the said order does not import and cannot be deemed to be taken as in the nature of articles of agreement previous to the marriage mentioned in said order; and it further appearing to the court from the affidavit of said Thomas Hodgens, filed the 7th of January, 1835, that having presented a petition to confirm the Master's report under said order, bearing date the said 28th day of November, 1827, in relation to the draft of said settlement, the said then Lord Chancellor declined to make any order, for the reasons stated in said affidavit. And it further appearing that the draft of the said settlement had never been approved of by any order of the court, and that by order, bearing date the 22d April, 1834, founded upon the petition of the said Anne Hodgens, it was ordered, that the Master should be at liberty to review his said report, bearing date the 8th day of February, 1828, and the draft of the marriage settlement \*therein men- [\*312] tioned, and therein to make amendments and variations therein specified beneficial to the said Anne Hodgens and her collateral relatives. And it further appearing to the court that the said Henry Walker Hodgens and Thomas Walker Hodgens the infant and only children of the said Thomas and Anne Hodg-

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ens since their marriage under the said order, bearing date the 28th day of November, 1827, are without any provision, after their full age, for their subsistence and advancement during the lifetime of the said Anne Hodgins. And it further appearing to the court that before any draft of the settlement should now be approved of, that regard should be had to the state of the facts and family as they now exist, and to the occurrences which have taken place, and especially to the events and circumstances which have occurred since making the said order, bearing date the 22d day of April, 1834, that it be and is hereby referred to William Henn, Esq., the Master, in proceeding under the said last mentioned order, to further inquire and report whether the said minors, Henry Walker Hodgins and Thomas Walker Hodgins, have been maintained out of the separate estate of the said Anne Hodgins up to any and what period, and whether in reviewing and approving of a draft of the said settlement under the order bearing date the 22d day of April, 1834, it will be necessary and proper, having regard to the circumstance in life of the said Thomas Hodgins, and to the consideration of his ability to maintain and educate the said two minors, according to [\*313] their future expectation \*and property, and afterwards to provide for them during the lifetime of their said mother; that any and what yearly sum should be limited, payable half yearly, out of the dividends of the fortune of the said Anne Hodgins to the said Thomas Hodgins during his lifetime, and afterwards to trustees for the said two children, in the event of the said Anne Hodgins surviving the said Thomas, during her life, for the purpose of providing for the maintenance and education of the said two minors during their minority, and afterwards of providing a suitable subsistence and advancement during the lifetime of their said mother; the said Thomas Hodgins undertaking to enter into and execute the said settlement with such proper covenants as the court shall approve, for the purpose of binding the said Thomas Hodgins yearly and every year to pass and file an account before Roderick Conner, Esq., the Master in the third cause, each Michaelmas term, for the said yearly sum so to be paid to him, and after allowing all

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just disbursements and allowances for the maintenance and education of the said minors, to vest the balance in government three and a half per cent. stock, and transfer same to the separate credit in the third cause of the said minors, Henry Walker Hodgens and Thomas Walker Hodgens, or of the survivor of them, and also to concur in all necessary acts for the continuing such provision as shall be made for them during the lifetime of the said Anne Hodgens, if she shall survive the said Thomas Hodgens. *And it is further ordered*, that the declaration and directions in the said order, bearing date the 22d day of April, 1834, \*be varied so far as they are inconsistent with this [\*314] order." And accordingly his Honor further declared, that "the said Master, in settling and approving of the said draft of the said settlement, ought to provide, by effectual provisions and limitations, to exclude the said Thomas Hodgens from any present, future and contingent interest in the real or personal estate of the said Anne Hodgens, or any part thereof, save the provision herein referred to the said Master to report for the said Thomas Hodgens, for the benefit of and in trust for the said two children, and save and except any benefit which he may derive under any appointment to be executed under the power of appointment mentioned in the said last mentioned order, and proposed to be reserved to the said Anne Hodgens to appoint to the said Thomas Hodgens, in the manner therein proposed, a portion of the said personal fortune not exceeding one-fifth; and the said Thomas Hodgens, on behalf of himself and said minors, consenting that the order to stay payments, bearing date the 12th day of January instant, should be discharged, upon the terms of the payments to the said Anne Hodgens, under the orders bearing date the 10th December, 1833, and 22d day of April, 1834, being reduced, pending the reference under this order, and until further order, as hereinafter ordered, *it is further ordered*, that the said order, bearing date the 12th day of January, instant, be discharged. *And it is further ordered*, that the Accountant-General of this court do, in execution of the said orders, bearing date 10th day of December, 1833, and 22d April, 1834, draw out of the \*dividends of the funds [\*315]



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mentioned in the said orders, now standing to the credit of the third cause, entitled in the Accountant-General's books, Thomas Hodgens and Anne Hodgens, otherwise Walker, his wife, against Elizabeth Wheeler and Lydia Carr, and to the separate credits of Anne Hodgens, as an interim provision in favor of said Anne Hodgens, or such person as she shall appoint by any writing, as her separate estate, for the sum or sums of 700*l.*, and so half yearly, for the like sum of 700*l.* out of the dividends when received from time to time until further order. And it is further ordered, that the residue of said dividends be half yearly invested, with the approbation of said Master, in government three and a half per cent. stock, and transferred to the credit of the third cause."

From this order Mrs. Hodgens now appealed.

Mr. Warren and Mr. *Richards*, for Mrs. Hodgens.

The court has no jurisdiction to deprive Mrs. Hodgens of any portion of her property, or to vary the settlement as approved of by the Master. Mr. Hodgens was guilty of a flagrant contempt, and the settlement was framed in accordance with the usual form in such cases; *Millet v. Rowse*, (a) *Like v. Beresford*, (b) *Stackpole v. Beaumont*. (c) Moreover by the 6th of Anne, c. 16, (an act peculiar to this country), a person who marries a [\*316] female \*infant under the age of eighteen years, without the consent of her parent or guardian, is disabled from receiving any advantage from her property. The principle on which the Master of the Rolls acted was, that, as the settlement rested merely in articles, the report approving of it not having been finally adopted by the court, the court could make such alteration as it thought fit; and that the settlement had been already varied by the order of the 22d April, 1834, on the application of Mrs. Hodgens. But the settlement, though not formally approved of by the court, has been acted upon by three distinct orders, of the 2d August, 1828, the 13th of February, 1829, and the 10th of December, 1833, by which the dividends of the

(a) 7 Ves. 419.

(b) 3 Ves. 506.

(c) Ib. 98.

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funded property and rents of the real property were ordered to be paid to Mrs. Hodgens' sole and separate use, which was in precise accordance with the trusts of the proposed settlement. In 1827, when Mrs. Hodgens came of age and was *sui juris*, Mr. Hodgens undertook to execute such settlement as the court should approve of, and a marriage took place upon the faith of that undertaking. Mrs. Hodgens might never have married Mr. Hodgens had she not relied upon the court carrying his proposals for a settlement into effect; the proposals in fact were a contract binding upon him, and, together with the Master's report, amount to a perfect settlement. As to the point relied upon by the Master of the Rolls, that the settlement had been actually varied by a previous order of April, 1834, the alteration made by that order was not sought for by Mrs. Hodgens, and was of no benefit to her; the court had no jurisdiction to make the alteration \*which was made by that order. The subsequent [\*317] misconduct of Mrs. Hodgens has nothing to do with the case, and will not prevent the court from executing the marriage articles; *Sidney v. Sidney*.(a)

Mr. Litton and Mr. Ball, for Mr. Hodgens.

There is no distinct authority, either way, as to whether the court can or cannot set apart a portion of the wife's property for the support of her children; but that question cannot arise here; for as no articles or settlement were actually executed, Mrs. Hodgens' property vested in her husband, absolutely, by the marriage, and as he has never parted with his marital rights, the court, in consequence of his contempt, has, through him, perfect dominion over the property, and there is now nothing to prevent the court from making a provision for these deserted and destitute children. The court is at liberty to look to the misconduct of Mrs. Hodgens, and, in now framing a settlement, take into consideration all the intervening circumstances; *Ball v. Coultts*.(b)

Mr. Warren, in reply.

(a) 3 P. Wms. 262.

(b) 1 Ves. & Bea. 303.

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There is no principle in equity by which the court can compel the wife to support her children ; that is the husband's duty, and it would open an unlimited field for litigation if the court were to take from the wife her separate property in order to [\*318] maintain the children. If the father \*were dead, it is beyond all question that the court could not deprive the wife of her separate estate, it is only by reason of his contempt that the court, through him, can come upon her property when it has become his by marriage, but here the property of the wife never vested in the husband at all. Previous to his marriage he had made proposals for a settlement of his wife's property, which the Master subsequently approved of, and the court afterwards adopted by different orders, and the court cannot, while he is alive, do what it would have no power to do if he were dead.

*21st February.*—THE LORD CHANCELLOR:—This case comes before me on appeal from the Rolls.

It appears that Mrs. Hodgens was early in life made a ward of this court ; that she was put to school, and that Mr. Hodgens obtained access to her through the medium of her mother. At the early age of about thirteen, as has been stated (and not having been denied, I must take it to be the fact), she was induced to visit Mr. Hodgens at his own house, and a marriage was then solemnized between them, of course without the leave of the court ; this marriage, however, was subsequently annulled during their absence abroad.

After the young lady had been sent back to school by the direction of the court, another interview took place in consequence of her going to Mr. Hodgens' house, and he exculpated himself, by swearing that she went there entirely of [\*319] \*her own accord, and without his knowledge ; upon that statement he was discharged, upon entering into a recognizance in 20,000*l.* not to have any further intercourse with her. The result, however, was, that he soon after obtained pos-

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session of this young lady. He contrived to have himself smuggled on board a vessel, where she joined him, he then took her abroad, and when she attained her majority he returned with her to this country.

Two sons were born, both of them subsequently to the second marriage, from which I infer, that as they had no child previously to that period, the parties had not lived together as man and wife. It is indeed lamentable to reflect, that this child, from so early an age, should have been kept in such a state of excitement and agitation, instead of receiving an education which would have tended to the improvement of her mind and morals. Mr. Hodgens himself may be justly considered responsible for his wife's misconduct. I do not mean to exonerate her from all blame, but I am not surprised at the fatal result that has followed. If ever there was a case which called for the utter exclusion of the husband from all participation in the fortune of the wife, it is this case, and even if I were bound to maintain in substance the order of the Master of the Rolls, nothing could induce me to allow Mr. Hodgens the dominion or control over a single shilling of this lady's property.

After all these events he resided abroad out of the jurisdiction of this court, until she attained her majority, [\*320] when he hoped to make better terms for her person and property. Shortly after their return from abroad, a petition was presented on the 28th of November, 1827, and on this petition there was an order made. [His Lordship here stated the petition of the 28th November, 1827, and the order made upon it.] The Master then made his report in the ordinary way; approving of a settlement by which the whole of the income was limited to the lady for life, and after her decease in trust for the children of the marriage, with power, however, to her by her will, to appoint any portion not exceeding one fifth to her husband, and in case there should be no issue of the marriage, in trust for such persons as she should appoint, and in default of appointment, for her, her executors, administrators and assigns.

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This settlement was not precisely what I should have approved of under the circumstances. It appears then, that Mr. Hodgens undertook, by written proposals, to execute whatever settlement the Master should adopt. The Master approved of a draft of settlement conformable to the proposals, but postponed the engrossment until the further order; he states that other parties were litigating the right to the minor's property, and this was the reason why the settlement was not engrossed at the time, as it was impossible to foresee what property she would be entitled to. The matter then came before the Lord Chancellor, and he postponed acting upon the report on the ground that the property was in litigation. I do not think that was a sufficient ground to prevent the execution of the settlement, as [\*321] the property might have been settled \*subject to the claims; however, the court in fact did act on the proposals for a settlement; for by an order made on the 2d of August, 1828, the Accountant-General was ordered to draw in her favor, for her sole and separate use, and upon her own separate receipt, the amount of the interest on the fund in court. This was the precise trust in the draft settlement and in the Master's report. On the 18th of February, 1829, the receiver over the freehold estate was discharged, and she was let into possession of the rents as her separate estate. Here then the court again acted specifically on the draft; and taking both of the orders together, the entire settlement was in this way adopted by the court. Afterwards differences arose between Hodgens and his wife, which may easily be accounted for. In April, 1834, she applied to the court, and it has been stated at the bar that she desired to vary the former orders; I do not think that circumstance would have operated against her; but it is not founded in fact, for there is not on the face of the petition any desire expressed on her part to vary the limitations in the draft. By the order made on that petition, after stating the previous orders, and that the settlement was adapted to the then existing state of the fund, the Master of the Rolls directed that the Master should review his report approving of a draft, and that the settlement should be framed so as effectually to exclude Hodgens from

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any possible interest in the property; and also directed a new modification of the trusts of the settlement, by providing, that in default of appointment by Mrs. Hodgens, the personal \*property should be limited to her next of kin, to the [\*322] express exclusion of her husband. Clearly this alteration was not called for by her, it was forced on her by the court, she did not seek it herself, and it really was of no benefit to her, as she had a power of appointment in default of issue. In 1834, then, the court again acts on the orders of 1828 and 1829, the Master's report, and the draft settlement. On the 12th of January, 1835, on the application of Mr. Hodgens, an order was for the first time made, staying the order of the 2d of August, 1828. In the mean time the unhappy circumstances which have been alluded to took place. She had undoubtedly committed adultery; there was a separation; the fact of adultery was proved, and Mr. Hodgens recovered a verdict for 3,000*l.* damages. I understand a new trial has been granted (which however is not very material), 1st, on the ground of surprise, as the defendant was not ready; 2dly, on the ground that the court believed that certain affidavits were filed, whereas it appeared that they had not been filed; in fact that the court was itself taken by surprise. What the result may be I cannot know.

The Master of the Rolls ultimately made an order on the 26th January, 1835, in which he states fully the grounds on which he proceeded. [His Lordship here read the order.] The effect of this order is to take a portion of the wife's separate income for the maintenance of the children, through the medium of the father, and so much, in addition, as will form for them an accumulated fund, \*independently of their mother, [\*323] when they attain twenty-one. These are the facts of the case.

It is necessary for me now to consider the jurisdiction of the court in the two cases; 1st, where there is no contempt; 2d, where there is a contempt; and then to consider the operation of the guilty conduct of the wife by committing adultery, or of

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the misconduct of the husband, as for instance, if he deserts his wife. If there has been no contempt, the husband is entitled to his wife's property by his marital right. But if this court gets a control over the fund, her right to a settlement is preserved; and if she does not come in to waive her right, the court will decree proposals to be made for a settlement on her and her issue. In *Murray v. Elibank*,<sup>(a)</sup> the demurrer having been overruled by Lord Eldon, the cause came on to be heard before Sir Wm. Grant, Master of the Rolls,<sup>(b)</sup> who decreed a settlement to be made on the children, although the wife died before any step was taken under this decree. In *Steinmetz v. Halthin*,<sup>(c)</sup> the Vice-Chancellor held, that a bill filed was sufficient to attach the wife's equity upon the property, and gave a right to the children surviving the wife (who had died pending the suit without waiving her equity), to have a provision out of the property. A question arose whether the children had any abstract right in the [\*324] mother's property? For if not, how \*happened it that the settlement always embraced the children? This question was much discussed in *Lloyd v. Williams*<sup>(d)</sup> before Sir Thomas Plumer, whose judgments for labor and research are inferior only to those of Lord Alvanley, of which it is impossible to speak too highly, and yet even he never ranked in the highest class of judges. In *Lloyd v. Williams*, Sir Thomas Plumer having examined the Registrar's books for the cases, held that the children had clearly no abstract right to a settlement except through the wife. The nature of the wife's equity is to secure a portion of the fund for herself, and the right of the children follows that of the wife; her equity is to a settlement, which from its very nature should provide for the children after their mother's death. Their right is entirely dependent upon her will, she cannot defeat their right, and preserve her own; but she can waive her right, and so defeat theirs. It is settled that the wife, by appearing in court, may waive the right to a settlement for herself, in which case no provision is made for the children; it follows therefore that the children have no independent right

(a) 10 Ves. 84.

(c) 1 Gly. & J. 64

(b) 13 Ves. 1.

(d) 1 Mad. 450.

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whatever. They come in after the wife; and there is no instance, and none has been cited, where the right of the children has been put in competition with that of the wife. In *Fenner v. Taylor*,<sup>(a)</sup> the husband actually agreed after the marriage to settle part of the wife's fortune on her, and nobody doubted that the children, as well as the wife, were included. The Vice-Chancellor<sup>(b)</sup> \*held, that the court could not take her consent [\*325] to waive that agreement, and so destroy the right of the children. On appeal to the Chancellor, he followed the decision of Sir William Grant in another branch of the same case, and reversed the order of the Vice-Chancellor. It afterwards came before Sir J. Leach again, when Master of the Rolls, and he followed the authority of the Lord Chancellor. This decision carries the principle further, for it shows that even after an actual agreement, there is a dominion in the wife over her own property as regards her children, and that before a settlement she can defeat their right.

Next, as to the cases where the husband has been in contempt. *Millet v. Rowse*<sup>(c)</sup> was a case of flagrant contempt; and if there ever was a case in which the court ought to guard strictly against any part of the property getting into the husband's hands, this is that case. I never will permit him to receive any portion of it, directly or indirectly. In cases of contempt the rule is to exclude the husband entirely. It is one of the penalties which this court inflicts. But if the contempt is not very flagitious, as for instance in *Bathurst v. Murray*,<sup>(d)</sup> a portion of the wife's income is sometimes, though rarely, given to the husband during coverture. Now one thing is clear, that while the woman remains a ward, the court does not altogether lose its power over the fund, and while the property \*remains in court, the [\*326] court retains its jurisdiction after the attainment of majority. That was decided in *Austen v. Halsey*.<sup>(e)</sup> If there has been a marriage of a ward under age, and an antenuptial settlement, and

(a) 2 Russ. & Mylne, 190:

(b) 1 Sim. 169.

(c) 7 Ves. 419.

(d) 8 Ves. 74.

(e) 2 Sim. & S. 123, n.



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she comes in after her majority and consents to that settlement, the court will adopt it, and not make a reference to the Master to approve of a settlement; *Leeds v. Barnardiston*.<sup>(a)</sup> In *Long v. Long*,<sup>(b)</sup> as it turned out that she did consent in court to have a part transferred, the settlement as to that part was not disturbed. There was a resettlement of a portion, and the rest she took out of court discharged of the settlement. There is this distinction where there is a contempt, that after an undertaking by the husband to make a settlement, the court will not permit him to receive her fortune; *Slackpole v. Beaumont*.<sup>(c)</sup>

As to the conduct of the wife, the consequence of elopement by her with an adulterer is, that she forfeits her dower, but that is by force of the statute of Westminster the second; the husband does not forfeit his estate by the curtesy, nor the wife her jointure by adultery; *Sidney v. Sidney*; <sup>(d)</sup> and notwithstanding her misconduct, she may file a bill and enforce a specific execution of articles making a provision for her separate use. In *Field v. Serres*,<sup>(e)</sup> a bond by the husband for the wife's benefit was, of course, held not to be affected by her adultery.

[\*327] \*There are cases where no settlement has been executed, but the fund is in court, and applications have been made by both parties after adultery by the wife, each claiming the fund: the course of the court in such cases has been to withhold the fund altogether, and neither to give it to the husband, as being the wife's property, nor to the wife, lest it might induce her to continue in adultery, and this it does to force the parties into an arrangement; *Ball v. Montgomery*; <sup>(g)</sup> *Carr v. Eastbrook*; <sup>(h)</sup> and in *Bullock v. Mensies*,<sup>(i)</sup> where there was a mere separation, I find the same rule was acted upon. This court makes the misconduct of the wife operate as a check even upon the husband. The mere adultery of the wife does not alter her rights in this court, which has not the power to punish, and it is

(a) 4 Sim. 538.

(b) 2 Sim. & S. 119.

(c) 3 Ves. 98.

(d) 3 P. Wms. 269.

(e) 1 N. R. 121.

(g) 2 Ves. Jun. 191.\*

(h) 4 Ves. 146.

(i) 4 Ves. 798.

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clear, as stated by Lord Hardwicke in *Head v. Head*,<sup>(a)</sup> that the court has not power generally to provide an alimony for the wife's separate use. But if the husband has deserted the wife, and the court has a continuing power over it, the court will seize on the wife's own property and income to maintain her during the desertion; *Wright v. Morley*.<sup>(b)</sup> The result of the authorities is, that even where there is no contempt or misconduct, the children can only be entitled under and after their mother.

Where there is a contempt, the husband \*is excluded [\*328] as against the wife altogether, and generally as against the children also; but this does not alter the relative rights of the wife and children as between themselves; it increases the amount of the present provision for the wife, but it casts upon her no obligation, to maintain her husband or children, and gives no conflicting rights to the children; and the power of the court in this case over the fund, was not lost by the lady's attaining her majority.

As to her subsequent misconduct, no case ever came before the court in which, on account of the misconduct of the wife, the court has provided for the children, living the wife, out of her property, much less varied a settlement in effect already made. No such right exists, the mother is not bound to provide for the children, she is not bound to maintain her husband and children out of the property to which she is entitled for her separate use. In *Ball v. Coutts*,<sup>(c)</sup> Lord Eldon distinctly allowed the wife pin money independently of maintenance. *Ball v. Coutts* is inaccurately reported, for it cannot be collected satisfactorily whether any portion of the wife's property was settled. I think no part of it was settled. The Master of the Rolls refers to several passages in that case to support the jurisdiction of the court, and also to this passage: "As to the second point, the 500*l.* a year proposed as maintenance for that marriage, I am not quite determined, having considerable doubts \*whether it is wholesome to place the children out of [\*329]

(a) 3 Atk. 547.

(b) 11 Ves. 12.

(c) 1 Ves. & Bea. 292.

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the control of the parent by giving them an independent fortune." No doubt Lord Eldon came to a sound conclusion, and nothing that fell from him there will interfere with what I am about to do here. Although the marriage in that case was without the leave of the court, yet the gentleman, who was of equal rank and fortune, settled 200*l.* per annum pin money and 500*l.* a year jointure. The question was, what was to be done in regard to the settlement? Lord Eldon said, "It is very difficult to establish that I can now hold that settlement to be improper, which the court, if its attention had been called to the subject, would have approved of in 1805, not, however, meaning to say that this settlement would have been approved of, but the court would not, from subsequent circumstances, disapprove of a settlement, which, if called to the consideration of it immediately after the marriage, it would have approved." If a man execute a proper settlement behind the back of the court, and the court is called on, under existing circumstances, to amend it, the court has perfect power then to have such settlement executed as it thinks proper. If the court find that the settlement executed was a proper one at the time, but intervening circumstances have occurred which render it not proper, the court, I think, has power to change and remodel such settlement, but must exercise a sound discretion. *Ball v. Coult* does not touch this case.

There is not a single authority to justify the order I [\*330] am \*called upon to make; I am required to set aside the Master's report, and to pay no regard to the proposals of Hodgens; I am called upon to set aside the two orders giving her the income for her separate use, in fact a strict execution of the proposals; and I am required to do this on the ground that Mr. Hodgens has two sons, and that he is not in a condition to maintain them. His petition states that he is a member of the bar, and the second son of a respectable merchant, and it appears that he is in the prime of life. Am I to be told that these two boys are such a burden that he can make no exertion to maintain them? It is his duty, as it ought to be his

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desire, to do so. I cannot believe that a father exists, with a profession, in health and without incumbrance, who is unable by his energies to maintain two boys of tender age; am I upon such a plea to cut down the wife's income, in order to relieve him from the duty of maintaining his own offspring? I never will consent to allow him to receive a single shilling of her property. He has kept her since her childhood in a state of agitation, torn from her school, her education neglected, and her morals corrupted. To allow him to maintain his children at her expense would be a premium for misconduct like his. In the first place, I am to consider whether I can, after this great lapse of time, vary the draft of the settlement. Secondly, whether, under these circumstances, I ought to do so. I am clearly of opinion that I cannot, and if I could, I am equally clear that I ought not to do so. The circumstances preclude me from making any alteration. Hodgens

\*undertook to execute a settlement, and made a proposal in writing, which, under the circumstances, was generally proper, that is, he denuded himself of the entire property and vested it in the wife for life, and afterwards in the children; and if the settlement had been at once executed, he must have maintained both himself and the children. That was followed by the court adopting the proposal, and it is perfectly clear that no other ground than the entangled nature of the property prevented the settlement from being at once executed. In substance the Master's report was confirmed by the two orders, the one giving her the exclusive income of the personal property, and the other discharging the receiver, so that there were two orders of the court acting on the proposals of this gentleman, which the Master had approved of; I am bound, therefore, by what the court has already done. The court has no power to punish her directly, and I will not do so indirectly, by seizing on this property which was dedicated to her for life by the order of the court. I am clearly of opinion that I am not at liberty to vary this draft settlement, and I say so with great deference and sincere respect for the opinion of the Master of the Rolls, but I must be saved by my own conscience, and acting upon my own

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judgment, I cannot now make a new settlement. If the court were not about to separate I should have felt bound to give the case further consideration, as it is not safe to trust one's self with a case of this description whilst the first impression of the facts remains; but I have had much experience in cases of [\*332] this nature; the \*authorities have not been brought before me now for the first time, and I have endeavored to guard myself against any undue impression. The wards of this court are too frequently the victims of designing and bad men, looking merely to their own interest. This decision may induce such men to pause in their career, for, whatever may be the conduct of the woman after such a marriage, the husband will be left to maintain all the children, during her life, without any aid from her fortune.

First, I have no power to alter the settlement, and, secondly, if I had, this is not a case in which I could exercise it. Therefore, reverse so much of the Master of the Rolls' order as directs a maintenance to be made for the children, and so much of the former order as stays the payment of the income to her, and direct her again to be let into possession of the freehold property.

Accordingly, it was ordered, "that the Accountant-General of this court do draw on the Bank of Ireland in favor of petitioner, Anne Hodgens, for the balance of the dividends which became due on the 5th of January last, and which she was restrained from receiving by the aforesaid orders; and that the Accountant-General do also, from time to time, draw on the said Bank of Ireland in favor of the said Anne Hodgens, on her separate receipt, for the dividends which shall from time [\*333] to time hereafter accrue \*due on the government and bank stock mentioned in the orders of the 10th of December, 1833, and 22d of April, 1834, pursuant to the directions contained in said orders respectively: and that the Register of this court be at liberty, and is hereby directed to make the order

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on the said petition, setting out the said petition at full length, notwithstanding the rule of this court to the contrary."

1st June.—This order was afterwards reversed by Lord Plunket.

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ELLIS v. NIMMO.

1835: 10th February.

A postnuptial agreement, in writing, by which a father undertook to make a provision for a child, will be specifically executed, being a contract founded on a meritorious consideration.

THE bill, which was filed by the Rev. Brabazon Ellis, and Mary, his wife, against John Nimmo, stated that Alexander Nimmo, being entitled to a leasehold interest in the premises of Roundstone, promised the plaintiff (the Rev. Brabazon Ellis), in case he married his niece, Mary, the daughter of his brother, the defendant John Nimmo, that he would settle upon her an annuity of 50*l.* during her life. That by a letter of 31st March, 1831, the defendant John Nimmo, wrote to plaintiff, Brabazon Ellis, as follows: "with regard to settling Roundstone upon Mary, she has 50*l.* a year secured upon the rents there, and that is much more than any other of my children can look for." That pursuant to said agreement said marriage took effect on the 19th of April, 1831, and from that time the plaintiff, Brabazon

\*Ellis, received said annuity until the death of the said [\*334] Alexander Nimmo, who died on the 7th of January, 1832, intestate without issue, leaving the defendant, John Nimmo, his heir at law, who also became his administrator; that upon the death of the said Alexander, the said J. Nimmo having become entitled to said premises of Roundstone, on the 7th of August, 1832, subscribed an agreement in writing to the following effect: "Mr. Nimmo will secure on Roundstone 50*l.* a year to Mrs. Ellis, during her life, and will allow her the use (as long as convenient to Mrs. Ellis to reside in Roundstone) of a house, together with whatever

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land Mr. Ellis wants for his own use; should it be expedient hereafter that Mr. Ellis should quit Roundstone, he is to be allowed an additional 8*l.* a year in lieu of the house, to effect an insurance on Mrs. Ellis' life for the sole benefit of the children of Mr. Ellis." That by a further agreement of the same date the house was to be given up to Mr. Nimmo on demand, and whatever was the actual expense of planting trees in the garden was to be allowed to Mr. Ellis. That the plaintiff, the Rev. Brabazon Ellis, had quitted said house at Roundstone, and that plaintiffs were entitled to said annuity of 8*l.* in addition to said 50*l.* a year, and a sum of 29*l.* due to plaintiffs for arrears thereof. That on the 28th of January, 1832, the defendant, John Nimmo, wrote a letter to plaintiff, Brabazon Ellis, in the words following :

"DEAR SIR:—"In terms of my late brother's letter, on the marriage of Mary, my daughter, I authorize you to [\*335] \*draw for her the sum of 50*l.* per annum out of the rents of the farm of Roundstone, but with this proviso, that it is neither to be mortgaged or sold, and will execute the necessary deed to the foregoing effect when called on."

(Signed)

"JOHN NIMMO."

The bill then prayed that it might be referred to one of the Masters to approve of a proper deed of annuity to be executed by the said John Nimmo, pursuant to said agreement, and to take an account on foot of the arrears of said annuity, and that said John Nimmo might be decreed to pay the arrears that should be reported due, and the gales to accrue due on said annuity, together with plaintiff's costs, and that a receiver might be appointed over a competent part of said premises to receive said annuity and the arrears that should accrue due thereon.

The defendant in his answer denied that either he or his brother, the said Alexander, had entered into any agreement *previous to the marriage of the plaintiff*, Mary, to make any settlement upon her, or that said marriage took effect in consequence of any such agreement. And as to the agreement made after

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the marriage, he insisted that it was not binding upon him, being a mere voluntary agreement without consideration. The agreement of the 7th of August, 1832, and the letter of the 28th of January, 1832, and 31st of March, 1831, were all proved, but it appeared \*that the letter of the 31st of March, [\*336] though dated (by mistake) in 1831, was not written until the 31st of March, 1832, subsequent to the marriage.

The plaintiffs, at the hearing, having failed to connect any of these letters with an antenuptial agreement, the Lord Chancellor called the attention of counsel to the consideration of the question, whether the postnuptial agreement of the 7th of August, 1832, by which the father undertook to make a provision for his child, was such a contract as this court should specifically enforce, and directed this point to be argued on some future day.

Mr. *F. Burke* and Mr. *J. Blake*, for the plaintiffs.

Mr. *Moore*, Mr. *Litton* and Mr. *Kane*, for the defendant.

19th February.—The case accordingly was argued this day by one counsel upon each side.

Mr. *F. Burke*, for the plaintiffs.

This is an agreement by a parent in favor of a child, for whom he was under a moral obligation to provide, and, therefore, such as a court of equity ought to enforce, being founded on a meritorious consideration. In *Colman v. Sarrell*(a) Lord Thurlow took a distinction between a voluntary settlement upon a meritorious consideration, as, \*for instance [\*337] a provision for a wife or child, and other voluntary deeds, and held that though equity would not in the latter case interfere to execute a defective conveyance, yet it would in the former. In *Pulvertoft v. Pulvertoft*,(b) Lord Eldon, when stating that the court would not interfere in favor of voluntary agres-

(a) 3 B. C. C. 12; S. C. 1 Ves. Jun. 50.

(b) 18 Ves. 99.



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ments, expressly declares that he did not speak of agreements for valuable or meritorious considerations; thereby putting both upon the same footing. *Sear v. Ashwell*,<sup>(a)</sup> and *Bolton v. Bolton*,<sup>(b)</sup> were also cited.

Mr. Moore, for the defendant.

Though a father may be under an obligation to provide for his daughter before marriage, yet that obligation ceases once she is married. The relationship of parent and child does not form a sufficient consideration to sustain an action at law upon a contract like the present; and if so, there is no ground for a court of equity to decree specific execution. In *Randall v. Morgan*,<sup>(c)</sup> the promise by a father after marriage, to make a provision for a natural child, was held a *nudum pactum*, and the court did not rely upon the circumstance of the child being illegitimate. If in this case there had been a conveyance actually executed, the consideration would be sufficient to maintain it; but a distinction is made where the assistance of the court is required to carry into effect a contract resting *in fieri*; in the latter case [\*338] the court will \*not lend its aid where the agreement is voluntary; *Colman v. Sarrel*,<sup>(d)</sup> *Ellison v. Ellison*.<sup>(e)</sup> In *Selby v. Selby*,<sup>(g)</sup> a letter from a mother to a son, on the occasion of his marriage, was held not to constitute a binding agreement, as it was not signed pursuant to the statute; but if the mere relationship had been in that case sufficient to sustain the agreement, there was no necessity for endeavoring to show that it was a good contract in consideration of marriage within the Statute of Frauds. Mr. Leach, in his argument in *Pulvertoft v. Pulvertoft*,<sup>(h)</sup> mentions that there is no instance in which the court had enforced a voluntary agreement in favor of a wife or child.

THE LORD CHANCELLOR:—In this case the question is, whether the consideration is sufficient to support a postnuptial agree-

(a) 3 Swans. 411, n.

(e) 6 Ves. 656.

(b) 3 Swans. 414, n.

(g) 3 Mer. 2.

(c) 12 Ves. 67.

(h) 18 Ves. 98.

(d) 1 Vea. Jun. 50, S. C. 3 B. C. C. 12.

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ment in writing, entered into by a father in favor of his child, as set forth in the bill. I will not decide the point now, and it is a singular fact that it never has been decided. If I were compelled to give my opinion without further consideration, I should say that the agreement ought to be specifically executed, but I do not mean to bind myself. The point is not new, and I have often had occasion to consider it: I was aware that there was no direct authority upon it. If we look back we shall find what was the consideration necessary to raise a use before and after the statute. In \*Gilbert on Uses, p. 92, it is [\*339] laid down, that "if a man, in consideration of natural love and affection, covenants to stand seised to the use of his son or brother, nephew or cousin, this is a good use." And again, at p. 457, "If a man, in consideration of love and affection to his wife and children, and to the intent to settle his lands in his name and blood, covenants with his brother and strangers, to stand seised to the use of himself for life, then to the use of his wife for life, and then to the use of the covenantees, and their heirs, it was held that no use arose to strangers because they could not come within the consideration, yet it did arise to the brother, both from the consideration expressed of settling the land in the name and blood of, &c., and also because he was his brother, yet there was a trust limited after the use to him." Upon a covenant to stand seised for the benefit of a wife or child, equity held such a consideration sufficient to bind the estate. That was a use before the statute; that use the statute executed and turned into a possession; still it rested upon the original equity. A covenant to stand seised was merely an agreement founded on a good or meritorious consideration, and the statute executed that agreement,

But although covenants to stand seised before the statute, were mere contracts which equity specifically enforced, yet, as the statute operated upon them, they were at once distinguished from mere agreements or contracts resting *in fieri* to settle an estate, just as bargains and \*sales, which before the [\*340] statute were contracts to sell, became actual conveyances

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by force of the statute, and were not confounded after the statute with simple contracts to sell, which from their nature could not be deemed executed. How far the considerations which before the statute were sufficient to support a covenant to stand seised, or a bargain and sale could sustain a contract to sell or settle an estate since the statute, so as to enable equity to specifically enforce it, has been the subject of much judicial investigation.

In *Fothergill v. Fothergill*,<sup>(a)</sup> it was held, "that whenever a conveyance was made upon a good consideration, if there be any defect in the execution of it, that this court hath always supplied the defect, as in case of a feoffment to supply the defect of livery, in devise of a copyhold to supply the defect of a surrender; and much more in the case of a power;" and it was further held "that payment of debts, provision for a wife and children, marriage or purchases were considerations for which this court had supplied such defects; and though provisions for wife or children after marriage are not valuable considerations, yet they are good considerations, and were always helped in this court." In *Chapman v. Gibson*,<sup>(b)</sup> a surrender was supplied in favor of the wife against the heir at law, and that is a common equity. Lord Alvanley stated in that case that he thought the execution of a [\*341] \*power and a surrender of copyhold go hand in hand precisely on the same ground. Now equity always aids a defective execution of a power voluntarily executed in favor of a wife or child as depending upon the natural obligation. It does not follow that the defect would be aided against the husband or father himself, because equity generally does not aid defective settlements, and in these cases there is no contract. But even though there be no contract, equity, with some violation of principle, as Sir W. Grant pointed out, aids the defect against the person in whom the estate is vested, not universally, but only in favor of a meritorious consideration: equity proceeded upon its original grounds, and looked on the consideration only as between the person making the defective settlement and the party claiming under it. But the court did not treat every consideration,

(a) 2 Freem. 256.

(b) 3 Bro. C. C. 228.

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which would have raised a use before the statute as sufficient to justify its interference after the statute.

In *Watts v. Bullas*,<sup>(a)</sup> (a case found fault with by Lord Hardwicke in *Goring v. Nash*,<sup>(b)</sup> which was decided by Lord Keeper Wright with the assistance of the Master of the Rolls, a voluntary conveyance to a brother of the half blood, defective at law, was made good in equity. The Lord Keeper's opinion was, that as the consideration of blood would at common law raise a use, and as before the statute such *cestui que* use should have compelled an \*execution of the use in a court of equity, [\*342] so would this imperfect conveyance raise a trust in respect of the consideration of blood, and consequently ought to be made good in equity. Lord Hardwicke was rightly of opinion that this was pursuing the maxims of the law too far, for that would carry it to the remotest blood that could raise a use in law, and which this court does not regard, but the principle was correct. In *Vernon v. Vernon*,<sup>(c)</sup> Lord King gave relief in equity in favor of collaterals not within the consideration of the marriage articles, where an action on the covenant might have been sustained at law in order to prevent circuity of action; and that was affirmed in the House of Lords, and the rule was adopted by Lord Hardwicke in *Stephens v. Trueman*.<sup>(d)</sup> In *Goring v. Nash*,<sup>(e)</sup> and *Osgood v. Strode*,<sup>(g)</sup> the court struggled to maintain the articles for the benefit of the remainder man, even though a stranger. Lord Hardwicke lays it down, in the former case, that the court will enforce articles even in favor of collaterals, as it never executes a settlement partially. The court appears to have been anxious to support an argument in favor of the family. In *Sutton v. Chetwynd*,<sup>(h)</sup> it was held that a covenant in marriage articles in favor of a stranger could not be supported by the consideration of marriage. In that case Sir William Grant admits that there are cases in which a court of equity has exe-

(a) 1 P. W. 60.

(b) 3 Atk. 189.

(c) 2 P. Wms. 594.

(d) 1 Vea. Sen. 73.

(e) 3 Atk. 185.

(g) 2 P. Wms. 249.

(h) 3 Mer. 249.

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[\*343] cuted covenants in favor of \*collaterals. That case afterwards went to the House of Lords, but on a different point, merely, that the provision for the stranger was purchased by a third party to the articles, and that, I think, was clearly established. The case was twice argued; I never could divest my mind of a doubt that that case was not properly decided in the House of Lords. Whilst arguing the general question before Lord Eldon, subsequently to the decision in the Lords, I stated to him my doubt, but added, truly that my mind was so naturally bent to his opinion that I had no difficulty in believing I was wrong. He said I would not advise you to be too sure that you are wrong; but we decided the case as well as we could, from which I rather collected that he himself entertained a doubt upon the point. In *Goring v. Nash*, Lord Hardwicke was clearly of opinion that he ought to execute the articles throughout, although the plaintiff was a volunteer. When he adverts to the third grounds of his decision, viz., that the limitation was part of the provision made by a father for a daughter, he says, "this is part of a provision for younger children, which is always favored here, and carried into execution;" and he lays it down that "they are to be considered as purchasers, by reason of the natural obligation of the parents to provide for their children." In *Colman v. Sarrel*,<sup>(a)</sup> the Lord Chancellor says,<sup>(b)</sup> "the difficulty is to show a case where any voluntary gift has been executed in equity." And again he says, "whenever [\*344] you come to equity to raise an \*interest by way of a trust, you must have a valuable, or at least a meritorious consideration." In the same case<sup>(c)</sup> the Chancellor says, "in order to raise a trust there must be a valuable consideration, or, at least, what a court of equity calls a meritorious consideration, such as payment of debts, or making a provision for a wife or child." So he clears up what was left in doubt as to the meaning of a meritorious consideration. I cannot doubt that Lord Thurlow was of opinion that a court of equity ought to execute in agreement, making a provision for a wife or child, as being

(a) 3 Bro. C. C. 12, and 1 Ves. Jun. 50.

(c) 3 B. C. C. 14.

(b) 1 Ves. Jun. 52.

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founded upon a meritorious consideration. In *Pulvertoft v. Pulvertoft*,<sup>(a)</sup> Sir S. Romilly in his argument lays it down in page 88 as a point admitting of no doubt, that "a contract would be enforced in favor of a wife and children." I would not in general refer to the arguments of counsel but on a point of this nature, in the absence of authority, it is excusable to do so; and he refers to the case of *Burke v. Dawson*, but I do not know what ultimately became of that case. Mr. Leach, in his reply (p. 98), stated that there was no instance in which the court had acted upon the distinction collected from Lord Thurlow's words in *Colman v. Sarrel*, by enforcing a voluntary agreement even for a wife or child. Lord Eldon says (p. 98), "the question is not as it is now put, whether, if there is a contract for a wife or children, this court would execute that contract as being for a meritorious consideration, but it must be considered as not resting in contract; and the distinction, \*he said, [\*345] was settled, that, in the case of a contract merely voluntary (he did not speak of a valuable or meritorious consideration), this court will do nothing. It is evident that he had a floating doubt upon it, he says, "I do not speak of a valuable or meritorious consideration," and he has told us before, that in speaking of a meritorious consideration he means a provision for a wife or child, and he did not mean to say that such a consideration would not be sufficient. It is left then for me to decide, upon principle, whether this agreement, being founded on a meritorious consideration, is to be enforced by this court. There must have been many such agreements, and it is strange that it should have devolved upon me to decide this question. In my opinion the contract should be specifically executed, although I have great hesitation in laying down the principle that such a contract can be enforced. I shall look again into the authorities, and I shall have an opportunity of reconsidering them before we meet again.

15th April.—THE LORD CHANCELLOR:—I have already declared my opinion on this question; but I took advantage of the

(a) 18 Ves. 84.

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vacation to consider it more carefully. The question is, whether an agreement for a meritorious consideration, resting *in fieri*, is such a contract as a court of equity will enforce. It is a singular circumstance that this question has never been decided.

I stated on a former occasion, that before the statute [\*346] the \*courts compelled the specific performance of agreements for valuable or meritorious considerations, and that they viewed meritorious considerations in a very favorable light, holding them to include not merely a wife or child, but some collaterals, as a brother, nephew or cousin. A covenant to stand seised was a mere contract or agreement by a person to settle or hold his estate for the benefit of his family, and a meritorious consideration alone, without a valuable consideration, was sufficient to support such a contract. Afterwards came the Statute for Transferring Uses into Possession. That statute made no other change than that of transferring or turning the use into a possession, which carries the legal right. Now in that view the statute operated on the original consideration. In the case of bargains and sales the use is still raised by reason of the old doctrine; money or rent was sufficient to raise such a use upon a bargain and sale, which was originally a contract for sale in a lease not executory. Equity before the statute raised the use, and after the statute the use was operated upon by the statute; covenants to stand seised, and bargains and sales, were quaintly called conveyances, not operating by transmutation of possession. The further interference of equity would seem to have been excluded, but the general voice being in favor of the continuance of uses, modes were invented for their re-introduction in spite of the statute, and the statute itself simply operated to introduce new modes of conveyance which would carry the legal estate. But this did not interfere with the ancient equities, or the operation of the statute upon them; suppose a [\*347] bargain and sale, in consideration of five shillings \*the statute would operate on that, and vest the legal estate, because there was a valuable consideration, and equity did not

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inquire into the amount of it. It had become a form of conveyance. Now if, since the statute, it should be shown that five shillings, which is merely a nominal consideration, was the only one, and there was no other equity, the court would set aside the conveyance, and look into the real merits, the original transaction being still open to investigation in this court, so that the conveyance, as such, still operates by force of the original equity, that the consideration was sufficient, and yet a court of equity may set aside the conveyance, because it deems the consideration insufficient.

As regards covenants to stand seised, they remain as before the statute, mere agreements to hold the estate for the benefit of the settler's family. In *Watts v. Bullas*,<sup>(a)</sup> the Lord Keeper, who had then recently come out of a court of law, seemed inclined to import the opinions he had there formed into equity, and he enforced a conveyance in favor of a brother of the half blood. Lord Hardwicke found fault with that, and it certainly carried the doctrine too far, but the principle is correct, and there is no reason why equity should not now execute an agreement, in the same manner as before the statute it would have compelled an execution of the use, provided it be within proper limits, for instance, a provision for a wife or child.

\*Defective executions of powers are said to be anala- [\*348]  
gous to this case. Such defective executions and defective surrenders of copyholds strictly depend upon the same rules. Now in these cases the court executes the intention of the settler, either against his representatives or the person taking the estate in default of a valid execution of the power or surrender of the copyholds, where there is a good consideration. If there be such a consideration the party taking the estate is not permitted to rely upon the defect; but the court will effectuate the intention of the settler, and, speaking generally, this equity is enforced, not against the settler himself, but in his favor, that is in the execution of his intention, and at the expense of a third party.

(a) 1 P. Wms. 60.



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Case of the Solicitors and Attorneys.

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That rule is now settled. But this case does not rest exactly on the same grounds as defective executions of powers, as in cases like the present there is a contract; whereas the former do not arise out of a contract, but depend upon an intention to settle. In all such cases, however, the court requires a sufficient consideration, and I find a provision for a wife or child is held a meritorious consideration, proper to call into action the power of a court of equity in aid of a defective execution or surrender. Now in my opinion it makes no difference whether that power is required to aid a defective surrender, or to enforce an agreement resting *in fieri*. In each case a sufficient consideration is necessary to enable the court to act. In the one case it has been established what is a sufficient consideration, and that must apply equally to the other case, viz., that now before the court.

[\*349] \*I have before me a contract which I am bound to enforce, if there is a sufficient consideration. The consideration is such as would enable the court to remedy even a defective settlement, where there is no contract. I think it *a fortiori* sufficient to sustain an actual contract, and I shall therefore decree a specific performance of the agreement. I do not think it necessary again to refer to the authorities upon which I observed upon the former occasion.

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14th July.—The decree in this case was affirmed by Lord Plunket on rehearing, but upon other grounds.

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## CASE OF THE SOLICITORS AND ATTORNEYS.

1835: 2d February.

The fees of solicitors and attorneys upon retainers since the 5th of January, 1826, are within the 4th section of the 6 Geo. 4, c. 79, and, therefore, not payable in the present currency.

QUESTIONS having arisen as to the effect of the 6 Geo. 4, c. 79, upon the rates of fees of solicitors and attorneys in Ireland, they

were, by an order of the 1st of February, 1834, directed to prepare a case in support of their claims. A case was accordingly prepared, and the question was argued this day at the King's Inns, before the Lord Chancellor, the Master of the Rolls, and the twelve judges.

*Mr. Lefroy* for the solicitors and attorneys.

The question now to be decided is, whether the fees of the solicitors and attorneys arising upon retainers since the \*Currency Act, are to be paid in British or Irish currency? [\*350] So far as the practice can be traced back, the solicitors and attorneys have received certain ancient and accustomed fees, and most of them appear to have originated from the appointment of the courts. No other origin can be ascribed to them; this may be collected from the circumstance, that the courts have at all times exercised, through the medium of their own officers, the right of regulating and controlling those fees. But whatever may be their origin, they are as old as the introduction of the law of England into this country; and in their origin they were not paid in a depreciated currency. In fact there was no depreciated currency in Ireland previous to the year 1465, the 5 Edw. 4, that is, for a period of more than two centuries after the introduction of the law of England into Ireland, consequently after the introduction of the fees of attorneys as incident to the practice of that law. There was originally no difference between the currency of England and Ireland; *Mixed Money Case.*(a) From that time, down to the late Currency Act, those fees were paid in the currency of the day. In order to establish that proposition it is necessary to attend to three dates, marking the periods at which the currency was changed in Ireland. Down to the year 1465, the currency in England and Ireland was the same. After that time the Irish currency was depreciated one fourth. In the year 1637 the uniformity of the currency was restored by pro-

(a) *Davis' Reports*, 57, 59.

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[\*351] clamations; \**Mixed Money Case*.(a) At that time therefore the currency of the two countries was put upon precisely

(a) Davis' Reports, 50.

COPY OF PROCLAMATION OF 1637.

*By the Lord Deputy and Councill.*

WENTWORTH:—Whereas the records and accompts of his Majestie's revenues, certain and casual in this kingdom, and all the receipts and issues of his Majestie's monies here, have heretofore usually been reckoned in Irish money or harpes, which is a fourth part less than sterling English, whereby it hath sometimes happened that his Majestie's processe to sheriffs, having issued after that manner, the sheriffs in some parts have been observed to levye sterling English money off the subjects, instead of Irish, thereby overcharging the subjects a fourth part more than of right they ought to pay, and the sheriffs, notwithstanding, answering in his Majestie's exchequer but Irish money onely, according to the summes contained in the green wax books; whereas, if the records, accompts and processe, were all in sterling, the subject who either pays money to the sheriffs, or other his Majestie's ministers, or receives money out of his Majestie's exchequer, would thereby more easily and certainly know what he is either to pay or receive. And whereas, it is observed, that great uncertainty sometimes ariseth in the interest of the subjects, touching reservations of rents or annuities, bills, bonds, contracts and other agreements, made between party and party for payment of monies, which is interpreted to be Irish, if the word sterling or English be wanting. And, whereas, his Majesty having taken notice of the said inconveniences, hath been graciously pleased to require us by Act of councill and proclamation, to prevent the continuance thereof, and so to provide, as that neither in his Majestie's receipts or issues, nor in the private interests of his subjects, any such differences or national distinctions doe any longer continua. We, therefore, in obedience to his Majestie's commands, doe, by this proclamation, publish and declare, and doe hereby strictly charge and command, that from and after the twentieth of March last, preceding the date hereof, all the accompts, receipts, payments and issues, of his Majestie's monies in this kingdom, doe passe and be accomptable in English money, and not as hath been formerly used in Irish money, viz., accompting twelve pence sterling, for sixteen pence Irish, and so *pro rata* for greater and lesser summes, and that all records to be made by, from, and after the said time of any of his Majestie's monies or debts, and all extracts of what kinde or nature soever of any debts due to his Majesty; and all surveys, inquisitions, and other records whatsoever, shall be from thenceforth returned, and made up, reckoned and accompted in English money, according to the rate aforesaid, and not as hath been formerly, and that all processees of what nature soever, issuing after the said time for any debts due to his Majesty, doe mention the summes in English money, according to the rate above mentioned, and that all reservations of rents, bills, bonds, contracts, and all other agreements after the first day of May next, to be made and contracted between party and party for moneyes, shall be understood and interpreted to be English, though the same have not the word sterling or English added to them, and that they be accord-

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the \*same footing. In the year 1737, the currency was [\*352] again reduced by proclamation,(b) making the money of

ingly so adjudged by all his Majestie's judges, and others whom it may concern, when and as often as any controversies of that kinde shall rise before them.

Given at his Majestie's Castle of Dublin, the sixth day of April, in the thirteenth yeare of his Majestie's raigne. Anno Dom. 1637.

(b) COPY OF PROCLAMATION OF 1737.

*By the Lords Justices and Councill.*

*Hu Armach. Wyndham, C. Hen. Boyle.*

Whereas his Majesty has been pleased to signify his royal pleasure, that a proclamation should issue for regulating the gold coins, current in this kingdom, and for that purpose, his Majesty's order in council, bearing date at his court, at Hampton Court, the twenty-first day of July, 1737, has been transmitted to us, setting forth, that whereas the Lord Lieutenant and council of this kingdom, have represented to his Majesty, that there is at present a great scarcity of silver coin in this kingdom, occasioned by persons being tempted to carry it out of this kingdom, to make an advantage thereof, and that the greatest part of the gold coin current here, is in the two larger pieces of Portugal gold, one of which, passing for four pounds, and the other for forty shillings, great inconveniences and difficulties daily arise in obtaining change for the same, and there being a disproportion between the value of the said large pieces and lesser pieces of foreign gold coin, to the advantage of the larger, the same has occasioned likewise a scarcity of the lesser pieces of gold coin, by means whereof great distress has been brought upon the trade, and particularly the linen manufacture of this kingdom, and also upon his Majesty's forces here, and therefore, humbly prayed that the gold coin, both English and foreign, current here, might be rated at the quantity of English silver they usually pass for in England, with an allowance of some small advantage to the lesser pieces. And, whereas, the Lords Commissioners of his Majesty's Treasury (to whom his Majesty thought proper to refer the consideration of the said representation) have reported to his Majesty in council, that they had taken the opinion of the late master-worker, and the rest of the principal officers of his Majesty's Mint thereupon, who proposed that a reduction should be made in the value of the gold coins, current in this kingdom, at least as low as they are in Great Britain, and the disproportion between the larger and lesser pieces should be rectified; which said proposal being agreed to by the said Lords Commissioners of the Treasury, and approved of by his Majesty in council, his Majesty has been graciously pleased, by his said order in council, to order that the following pieces of gold current in this kingdom, do pass in payment within this kingdom, at the rates hereinafter respectively specified, and that a proclamation should be issued to that effect. We, therefore, the lords justices in council, in obedience to his Majesty's said order, do by this our proclamation, publish and declare, that the several pieces of gold coin hereinafter mentioned, shall from and after the 10th day of September next. pass and be accepted in all receipts and payments, as well to and from

## Case of the Solicitors and Attorneys.

- [\*353] England \*current in Ireland for one thirteenth more than in England. Down to 1826 the currency remained
- [\*354] so, the \*Act restoring the uniformity of the currency in both countries having passed in the previous year.
- [\*355] During all \*this time the Irish solicitors and attorneys were paid their fees in the aliquot parts of a pound, in
- [\*356] the currency of the day.(a) Returns of the fees \*of officers were made under commissions issued at different periods, and in those returns certain fees of the attorneys appear incidentally. In England also, the fees of the solicitors and attorneys have always been aliquot parts of the pound sterling

his Majesty, as otherwise, however, as current money within this kingdom, at the several rates hereinafter respectively specified, and none other, that is to say,

	WEIGHT.		VALUR.		
	dwt.	grs.	£	s.	d.
The guinea at - - - - -	0	0	1	2	9
The half guinea - - - - -	0	0	0	11	4½
The moidore - - - - -	6	22	1	9	3
The half moidore - - - - -	3	11	1	14	8
The quarter moidore - - - - -	1	17½	0	7	4
The quadruple pistole - - - - -	17	8	3	13	0
The Spanish or French double pistole - - - - -	8	16	1	16	6
The Spanish or French pistole - - - - -	4	8	0	18	3
The Spanish or French half pistole - - - - -	2	4	0	9	2
The Spanish or French quarter pistole - - - - -	1	2	0	4	7
The French Louis-d'or, of the new species - - - - -	5	5	1	2	0
The French half Louis-d'or - - - - -	2	14½	0	11	0
The French quarter Louis d'or - - - - -	1	7½	0	5	6
The piece of new gold coin of Portugal - - - - -	18	10½	3	17	8
The half piece ditto - - - - -	9	5½	1	18	10
The quarter piece ditto - - - - -	4	14½	0	19	6
The half quarter ditto - - - - -	2	7½	0	9	10
The sixteenth ditto - - - - -	1	3½	0	4	11

And if any of the aforesaid pieces of foreign gold shall want of the respective weights hereinbefore mentioned, then allowance is to be given of two pence for each grain, one penny for half a grain, and one halfpenny for one quarter of a grain, so wanting in any piece of the said foreign gold coins, and so proportionably for every greater want of weight in the said pieces; and in case such defect of weight, as aforesaid, shall be supplied in manner aforesaid, then, and in such case, every piece so defective in the weight, as aforesaid, and that defect of weight so supplied as aforesaid, is to be henceforth allowed, and to pass as current money as aforesaid, &c.

Given at the Council Chamber in Dublin, the 10th of September, 1737.

(a) The following TABLE was referred to as exhibiting the fees of attorneys, returned in the years 1635, 1718, 1733, and 1768, for duties performed in the office of the Second Remembrancer of the Court of Exchequer.

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of the money of the day, notwithstanding that the currency in England has also varied from time to time.(a) This must be ascribed \*either to the circumstance that these [\*357]

For certain Acts performed by Attorneys in the Office of the Clerk of the Pipe.	Fees returned in 1685.			Same Fees returned in 1718 and repeated in 1733.			Same Fees returned in 1765		
	£	s.	d.	£	s.	d.	£	s.	d.
<i>Item</i> , to the attorney in the same office who writeth the books, and likewise attendeth the same	0	6	8	0	6	8	0	6	8
<i>Item</i> , to the attorney in said office for drawing up a copy of the record <i>verbatim</i> , which is called the <i>foot</i> of his account	0	6	8	0	6	8	0	6	8
<i>Item</i> , to the attorney for drawing the sheriff's <i>quictus est</i>	0	6	8	0	6	8	0	6	8
<i>Item</i> , to the attorney for his attendance at every sheriff's opposal	0	3	4	0	3	4	0	3	4
<i>Item</i> , to him for his attendance at every sheriff's casting out of court	0	3	4	0	3	4	0	3	4
<i>Item</i> , to him for examining and quoting the foreign account of every sheriff which is declared before the Lord Chief Baron, and certified by the auditors, containing the several seizures, felon's goods of the whole year to be charged upon the sheriff in the records of the pipe	0	6	8	0	6	8	0	6	8

(a) The following TABLE was referred to as showing the decrease in purity, weight and value of gold coins in England, from the first known coinage of gold in England to the last alteration made.

A. D.	Time of making alterations, and the name of one coin of each coinage.	Finesses.	Weight of fine gold.		Current value.
			Carats. Grs.	Grains.	
1257	41st Henry III. of fine gold, the Penny	24 0		45	1 8
1344	18th Edward III., the Florin	23 3½		108	6 0
1344	18th " Rose Noble	23 3½		138	6 8
1346	20th " "	23 3½		128	6 8
1353	27th " "	23 3½		120	6 8
1414	2d Henry V. "	23 3½		108	6 8
1460	1st Edward IV. "	23 3½		120	8 4
1465	5th " "	23 3½		120	10 0
1527	18th Henry VIII. "	23 3½		120	11 3
1544	35th " Angel	22 0		80	8 0
1545	36th Henry VIII., Sovereign.	20 0		192	20 0
1549	3rd Edward VI. "	22 0		169	20 0
1551	5th " "	22 0		178	20 0
1553	1st Mary, Angel	23 3½		80	6 8
1558	1st Elizabeth "	23 3½		80	10 0
1601	43d " "	22 0		78	10 0
1603	1st James I., Sovereign	22 0		171	20 0
1604	2d " Unit	22 0		154	20 0
1605	3d " Angel	23 3½		71	10 0
1610	9th " Gold coins then extant raised 10 per cent. by proclamation				

## Case of the Solicitors and Attorneys.

fees were in their institution appointed by the court to be certain aliquot parts of a pound, or to the common law principle, that all liabilities to the payment of money were to be discharged according to the currency of the day; *Mixed Money Case.*(a) Whatever the king has the prerogative to do [\*358] \*by proclamation, is of equal validity with an Act of the legislature, and if the change of the currency in 1826 had been by proclamation, the solicitors and attorneys would have been entitled, as in 1637, to be paid in the new currency, and it can make no difference as to their rights, whether the alteration in the currency was made by proclamation or by Act of Parliament. The Currency Act commences by reciting the great inconveniences arising from the difference of the currency, and that it would be expedient, without disturbing the relation of debtor and creditor, that there should thereafter be one uniform currency, and it enacts, that after the commencement of the Act, all gifts, grants, contracts, &c., which shall be had, made, done, &c., shall be had, made, done, executed and entered into according to the currency of Great Britain, and shall be had, made, done, &c., according to such currency, except as thereafter especially provided, unless the contrary be proved to have been the intention of the parties. Then comes the second section, which carries into effect that saving which the legislature had announced in the recital, and it saves all contracts and debts due, or to grow due under any contract, dealing or transaction, had, made or entered into at any

A. D.	Time of making alterations, and the name of one coin of each coinage.	Fineness.		Weight of fine gold.	Current value.	
		Carets.	Grs.		s.	d.
1619	20th " Angel	23	3½	64	11	0
1625	1st Charles I. "	23	3½	64	10	0
1625	1st " Unit	22	0	140	20	0
1661	1st Charles II. Gold coins then extant raised 14 per cent. and upwards by proclamation					
1663	Guinea	22	0	129	20	0
1696	7th and 8th William. In this year the Guinea was made legally current at the prices here mentioned	-	-	-	28	0
					26	0
					22	0
1717	3d George I. And at this time made legally current at	-	-	-	21	0

(a) Davis 48, 72.

time before the commencement of the Act. It is then quite plain that the policy of this Act was, in all cases where the parties were silent, to have, as far as possible, all future contracts carried into execution in the currency of the day. Now retainers subsequent to the Act are contracts entered into under the first section, and \*therefore ought to be discharged [\*359] in the present currency. But as regards suits in progress before the Act, it is admitted that the fees, being founded upon antecedent retainers, should be paid in the old currency. It cannot be said that this argument would open a right to all the officers of the court to be paid their fees in the currency of the day; their case is distinguishable from that of the attorneys, inasmuch as the attorney's fee arises upon a contract, whereas that of the officer arises out of the discharge of an imperative duty: moreover, the fees of the officers are settled by Act of Parliament, but the fees of attorneys are left as they ever had been. Great inconvenience will arise if it is held that the fees of the solicitors are to be paid in the old currency, as they will have to keep their accounts in different currencies, contrary to the policy of the Act. By the general order(a) of 1832, certain fees were given to \*the attorney in the present currency, [\*360] and if their ancient fees are to be paid in the old currency, great confusion must arise in preparing their bills of costs.

*The Attorney-General, contra.*

The instant the attorney is retained he contracts duties, and for the discharge of these he is entitled to certain fees, by virtue

(a) By an order of the 8th day of May, 1832, signed by the twelve judges, it is ordered, that from and after the first day of Trinity Term next, in all actions to which the rule of Hilary Term, 2 Wm. 4, for shortening declarations shall apply, if the debt shall amount to the sum of 20*l*. or upwards, and the declaration shall contain less than twenty sheets, the taxing officer shall allow,

For the declaration, instructions to counsel, draft, and engrossing of the declaration, the sum of - - - - - £1 11 6  
 And for the attorney's fee, on enrolling any judgment - - - - - 0 7 6  
 And for the attorney's fee for attending to tax costs - - - - - 0 6 8  
 provided that this order shall not extend to cases in which several actions shall be brought on the same bill or note against several parties thereto.



in some cases, of Acts of Parliament and rules of court, and in other cases by a sort of prescriptive right. The fee being regulated and ascertained by any one of these modes, it is not competent to him to increase it, or to the suitor to diminish it. No distinction can be drawn between the case of the officer of the court and attorney and solicitor; with reference to the construction of this Act they stand precisely upon the same footing; and it is because attorneys and solicitors are officers, that any question of this sort can be submitted to the present tribunal.

The first section of the Act of Parliament relates to future contracts; contracts in their nature, and according to the legal definition of the term, contracts. In the second clause of the Act there are three distinct objects; the first is a provision which relates to gifts and contracts, subsisting at the time of the Act; the second relates to the case where the contract was already made, and where debts were to grow due thereafter; but the third relates to this particular case, it relates to cases where future acts of the parties were necessary in order to create a liability, [\*361] but where the law had previously measured the amount of the compensation, when the liability was once incurred. The first section is, from its very nature, inapplicable to the case before the court, because that section relates to cases where the contract is entirely in the power and dominion of the parties; but the second section clearly includes this case. There were, previous to the passing of the Act, statute laws and rules of court prescribing the fees of officers and attorneys: these were all the means by which the liability to pay money was to be ascertained and fixed; they were all in existence before the passing of that Act, and are the "transactions, dealings, matters and things relating to money or involving or implying the payment of money or the liability to pay, which shall have been or shall be acknowledged, confessed," &c., before the commencement of the Act. The tenth section also seems applicable to this case as being a liability arising, not out of a contract, but out of implication of law founded upon a contract; that is, upon rules, Acts of Parliament, and prescriptive

usage, by which attorneys' fees are regulated, and which were in force prior to the commencement of the Act.

The *Lord Chancellor* directed the attention of the counsel for the solicitors to the fourth section, as appearing to him to include their case.

*Mr. Jackson*, in reply.

The only section of the Act which can affect the right of the solicitors and attorneys is the fourth, and there are no \*words in it which can apply, by any rule of construction, to their fees; it does not relate to contracts. The words are, "due or payable under the authority, or by virtue of any usage or custom which shall be in force prior to the commencement of the Act." The fees are founded upon contract, although the amount may have been regulated by custom or usage. Moreover the words customs and usages relate to something *ejusdem generis* with the matters in the other parts of the section, i. e., to the public revenue, &c. If the words usage or custom in this section are to be applied to fees of attorneys, it is essential to see what that usage and custom was with respect to their fees anterior to the depreciation of the currency in Ireland. But supposing the section does apply to attorneys' fees, it is inoperative, as the custom and usage was to allow them their fees in aliquot parts of the pound sterling of the currency of the day.

The court having deliberated for some time, the *Lord Chancellor* then pronounced judgment.

The judges have considered the case, and the question before them, simply upon the claim of right under the Act of Parliament, and therefore they have not at all entered into the question whether, under existing circumstances, the fees ought to be raised in the courts of law or in the courts of equity. It may turn out that they ought to be raised in both; it may turn out that they should be raised in one, and not in the other, and it

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may turn out that they should be raised in neither. It [\*363] is a question to be considered, \*and upon which the judges will be ready to enter. But upon the question now before them, they are of opinion that the case is provided for by the words which are to be found in the fourth section of the Act of Parliament, and therefore they are of opinion, that, as a matter of right, the attorneys are not entitled to that which they claim.(a)

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BIRCH v. HUTCHINSON.

1835: 7th February.

Notwithstanding the 4 & 5 Wm. 4, c. 78, a replication cannot be filed, without an office copy of the answer being taken out; but after a decree an answer is a paper or document, within the 17th section of that Act, of which the suitor may have a partial copy.

An application was made on the part of the plaintiffs for an order that the Deputy Keeper of the Rolls should forthwith file the replication to the answer of the defendant, although no attested copy of the answer had been taken out, and without the plaintiff being compelled to take out any copy of said answer.

Mr. Warren, in support of the motion.

The question here arises upon the construction of the 17th section of the 4 & 5 Wm. 4, c. 78.(b) Mr. Smith, the [\*364] \*plaintiff's solicitor, applied to the Deputy Keeper of the Rolls to file a replication in this cause, without having taken out a copy of the answer, considering that an answer

(a) The arguments in this case have been abridged from Mr. Mongan's notes.

(b) By the 17th section it is enacted, that no person shall be compelled or required to take or pay for any copy of any paper or document being in any office of the said court; and that every person shall be at liberty to take out and pay for only so much or such part of any paper or document, being in any office of the said court, as such person may require, without being in any case compelled to take out or pay for the entire of the paper or document being in the office.

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is a paper or document within the meaning of that section. The Deputy Keeper of the Rolls refuses to file such replication unless the plaintiff shall take out an attested copy of the answer, and relies upon the ancient practice of court as laid down in No. 7 of Primate Boyle's Rules,<sup>(a)</sup> and insists that the practice has not been varied by the late Act of 4 & 5 of Wm. 4, c. 78, and that the words "papers or documents" do not include pleadings. The object of Primate Boyle's Rule was to insure accuracy in the pleader; but by the new practice a formal replication is to be filed in every case; the practice, therefore, of taking out a copy of an answer is unnecessary, the reason for it having ceased. It appears from the preamble of the Act that the object was to diminish the expense of the suitors, which will be defeated if they are compelled to take out copies of answers which may be \*perfectly useless to them. By the 16th item in [\*365] schedule No. 2, to the 4 Geo. 4, c. 61, the Deputy Keeper of the Rolls is entitled to demand a fee of 6 1-2d. per sheet "for the attested copies of pleadings, and of all records and other documents." In No. 3, item 6, the examiner is allowed a similar fee "for copies of reports, charges, discharges, and all other documents." Again, in schedule 10, item 46, a fee is allowed to the clerk of the hanaper "for every writ, pleading, or other document." These show clearly that the word "document" is considered by the legislature as synonymous with a "pleading." An answer, therefore, is a document, and within the meaning of the 17th section. The Deputy Keeper of the Rolls also relies upon the 122d(b) and 124th(b) of the new rules, and insists that

(a) By this rule it was ordered, "That no counsel, or any of the six clerks do draw any answer to a bill, without having an attested copy of the bill before him, for any replication, without having an attested copy of the answer, and so of other pleadings; and in case any such pleadings shall be tendered at the rolls office, where a copy of the former pleading has not been taken out as aforesaid, the clerk of the rolls may refuse the filing thereof." *O'Keefe's Rules*, Appen. 3, Rule 7.

(b) The 122d rule (29th Nov. 1834), directs, "that the six clerk for any party in the cause, upon lodging with him the certificate that publication has passed, and also a rolls' certificate, that one entire copy of the pleadings has been taken out, shall be at liberty to issue a subpoena to hear judgment when the same is necessary."

(c) The following is he part of the 124th rule (29th November, 1834) referred

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by those rules one entire copy of the pleadings must be  
 [\*366] \*taken out before a cause can be set down for hearing,  
 but the present application is not to have the cause set  
 down, but merely to have the replication filed, and so far from  
 the 122d new rule being favorable to that view, on the contrary,  
 it may be implied from it that publication may pass before the  
 entire copy of the pleadings is taken out.

*The Attorney-General for the Deputy Keeper of the Rolls.*

This claim rests upon the construction of the 17th section, and  
 if the construction contended for be correct, Primate Boyle's rule  
 must be considered as superseded. The object of that rule was,  
 that there might be in existence an authentic copy of the plead-  
 ings, to which the court itself might have recourse without refer-  
 ring to the original record; that reason for the practice still con-  
 tinues, and the new rules are made upon the supposition that  
 Primate Boyle's rule is in full force. The 122d new rule only  
 requires that a certificate of one entire copy of the pleadings  
 having been taken out, should be produced before a subpoena to  
 hear judgment can be issued, from which no inference can be  
 drawn that the copy need not be taken out until then.  
 [\*367] The 4th section, (a) coupled with the 17th \*section, af-  
 fords an explanation of the latter; by the former the  
 suitor is enabled to take an office copy of so much only of any  
 "decree, order, report, or exceptions," as he may require, and is

to. "And that in all cases where a subpoena to hear judgment is unnecessary, the  
 six clerk, upon having lodged with him a certificate of publication having passed,  
 and likewise a certificate of one entire copy of the pleadings having been taken out,  
 where such certificates are now necessary, shall be at liberty to transmit to the Re-  
 gistrar a like docket for setting down the cause, to the end that the several causes  
 shall be placed in the proper list for hearing."

(a) The 4th section of 4 & 5 Wm. 4, c. 78, enacts, that any person shall be at  
 liberty to take an office copy of so much only of any decree, order, report, or excep-  
 tions as he may require; and that, unless the court shall otherwise specially direct,  
 no recitals shall be introduced in any decree or order of the said court; but the  
 pleadings, petition, notice, report, evidences, affidavits, exhibits, or other matters or  
 documents, on which such decrees or orders shall be founded shall merely be re-  
 ferred to.

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*Birch v. Hutchinson.*


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expressly confined to the four species, and these only are the documents referred to in the 17th section.

THE LORD CHANCELLOR:—The question here is, whether a party may file a replication without taking out a copy of the answer; or whether a party, before replication, is entitled to demand from the officer a copy of part of an answer. The clause in the Irish Act of 4 & 5 Wm. 4, c. 78, is founded, as I suspected, on the English Act; though the practice in Ireland is different from the English practice, and is independent of the Act. The Irish practice depends on a rule of Primate Boyle. This rule, the only object of which appears to be to insure the accuracy of counsel, winds up by saying, that no counsel or any of the six clerks do draw any answer to a bill without having an attested copy of the bill before him, nor any replication without having an attested copy of the answer," therefore (if this rule have not become obsolete and fallen into disuse) independently of the Act, a party cannot file a replication without having \*taken out an office copy of the answer. The 4 & 5 W. [\*368] 4, c. 78, provides, in section 4, in these words, "that any person shall be at liberty to take an office copy of so much only of any decree, order, report or exceptions, as he may require." This is expressly confined to office copies of decrees, &c. By the 17th section it is enacted, "that no person shall be compelled or required to take or pay for any copy of any paper or document being in any office of the said court, and that every person shall be at liberty to take out and pay for only so much or such part of any paper or document, being in any office of the said court, as such person may require, without being in any case compelled to take out or pay for the entire of the paper or document being in the office." Now the question is, whether, pending a cause, and before a decree, an answer is a paper or document within the meaning of this section. If we look at orders 122 and 124 we find that one entire copy of the pleadings must be taken out, but these rules do not conclude the question as to what time, or when such copy should be taken out. They, however, show the view which the Lord Chancellor and Master

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of the Rolls took of the Act. If I decide that a party cannot before replication demand a copy of part of an answer, I shall do no injury, as an entire copy of the pleadings must be taken out before the cause can be set down. In the English Act, 3 & 4 W. 4, c. 94, from which both these clauses are taken, it is enacted in section 10, "that any person shall be at liberty to take an office copy of so much only of any decree, order, report or exceptions, as he may require," and \*that, unless the court shall otherwise specially direct, no recitals shall be introduced in any decree or order of the said court, but the pleadings, petitions, notice, report, evidences, affidavits, exhibits or other matters or documents, on which such decrees or orders shall be founded, shall be merely referred to. Section 4 in the Irish Act is copied from that; section 19 of the English Act is the corresponding section to section 17 of the Irish Act, but with considerable variations. (His Lordship here read the 17th section of 4 & 5 W. 4, c. 78.) When I read that section, I said I suspected that it related to papers and documents in the Master's office. Now the 19th section of the English Act enacts "that no person shall be compelled to take or pay for any copy of any paper or document being in the office of any Master in ordinary, and that every person shall be at liberty to take a copy of such part only as he may require of any paper or document, being in the office of any such Master, and of any interrogatories and depositions, being in the office of either of the examiners of said court." I was satisfied that whoever drew this section in the Irish Act had the Master's office particularly in his view, and I find from this clause, from which the section in the Irish Act is copied, that it relates to papers in the Master's office. But it is extended in the Irish Act to papers in any office of the court. The English as well as the Irish Act is defective; for it does not apply to pleadings which the Act directs shall not appear on the face of the decree. It is clear that under the English

[\*369] Act a suitor cannot obtain a \*copy of a part of an answer, though he is entitled to partial copies of papers and documents in the Master's office, and of the interrogatories and depositions in the office of the examiners. By the 4 Geo. 4,

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c. 61, sch. No. 2, I find a charge of 2s. 6d. is allowed for every search and taking down a document for inspection. This shows the right of the suitor to have the document handed down, and he is allowed, I am told, to take extracts. The question for me now to decide in effect is, whether the Irish Act does or does not permit a replication to be filed without an office copy of an answer being taken out? By referring to one of the Acts which go by my name, I mean 1 W. 4, c. 36, s. 15, rule 14, I find that in England, where a defendant is in custody for contempt in not answering, he may put in his answer without being compelled to take out an office copy of the bill. [His Lordship here read the rule.] This seems to assume the right of the officer to have an office copy taken out, but relieves the poor man by permitting him to answer without the burden of paying for an office copy of the bill. The true intent of the 4 & 5 W. 4 was not to alter the practice. The 17th section did not mean to treat an answer as a paper or document within the rule, but it is merely meant to relieve a suitor from the expense of taking out copies which he does not require; nobody can doubt that a party cannot file a replication without seeing the answer, or file an answer without seeing the bill. Counsel must have the answer before him in order to file a replication; because, on looking into the answer he may find the replication not the proper course of proceeding. The rule \*of this court makes it imperative that office copies of [\*371] the pleadings should be taken out, and the 17th section does not alter or prohibit this practice. But I am of opinion that after a decree made, and after the pleadings are concluded and the answer is no longer a living subject, if I may so express myself, but only a link in the cause, an answer becomes a paper or document in the office, and a party may go into the office and insist upon having a partial extract from an answer. I think then, that after the decree is made, the answer, as well as the bill, is a paper or document of which the suitor may have a partial copy; but in other respects the Act does not alter the practice. This being a proper question to be brought before the court, I shall give no costs.

No rule was made upon the motion.



## OFFICERS OF THE COURT.

1835: 22d April.

Fees of the officers of the court. Construction of 4 Geo. 4, c. 61.

THE LORD CHANCELLOR:—One of the first things to which my attention was called, upon entering upon the duties of my office, was the report of the Masters, made pursuant to an order of December, 1833, whereby certain matters were referred to them connected with the officers of the court. Their [\*372] report is \*dated the 12th day of May, 1834. It was a painful duty to perform, but I entered upon it as soon as my sittings were over, and I made an order for the hearing of the matter of the report on the first day of this term, with liberty to the several officers to argue by counsel any question arising upon the report. This they declined to do, with the exception of a London commissioner, whose case I heard and disposed of on the first day of term.

## I. Several questions now call for my decision :

1. The officers of the court were in the habit of charging the suitor for paper and parchment, and this charge was considered legal by the Court of Exchequer ; but, after the best consideration I can give to the point, I think that is not authorized by the Act, which gives only one general fee for the copies, &c., and that, I think, includes the charge for all stationery, pens, ink, paper, &c. This extends to all the officers of the court, who are not in future to make the charge in question.

*Examiners.*

2. The chief examiners, when required to re-attest copies of books of depositions, charged not only 6s. 8d. for re-attesting each book, but also 2s. 6d. for a search for the year, and 4d. for each preceding term. These were claimed under Table VI. Nos. 5,

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6, and 10. I am of opinion that the fees of 2s. 6d. and 4d. under Nos. 5 and 6 in the table, cannot be claimed in such cases, but only 6s. 8d. under No. 10. That is the single fee for \*the whole duty, and if any search is necessary it must [\*373] be performed without any additional charge.

3. The examiners in chief were in the habit of charging, in addition to the fees specified in items Nos. 1 and 2, in Table VI., a fee of 2s. 6d. under No. 8, for a certificate, and they accordingly gave a certificate in the copy of the depositions, at the conclusion of the examination of each witness. I am of opinion that this charge for a certificate is not warranted by the Act, and that no certificate is necessary, but if it were necessary, only one fee would be payable under Nos. 1 and 2.

4. A question has arisen, whether a witness having been examined as a first witness, and charged for as such, under No. 1, in Table VI., can again be charged for at any higher rate than under No. 2 in that table, and I am of opinion that he cannot.

5. It appears that the examiners in chief received on copies of interrogatories, issuing from their offices, 10d. per office sheet. This was under No. 3 of Table VI. That number speaks only of depositions, copies of which are to be paid for by the person lodging the interrogatories. The larger remuneration, viz., 10d., was only for the copies of that upon which the labor of the examiner had been bestowed. It affords no reason why 10d. should be paid for both interrogatories and depositions, that, as it is alleged, a copy of the depositions is not by the practice \*to be furnished without a copy of the inter- [\*374] rogatories. It is alleged that if 10d. is not the proper charge none can be made, but the next No. (4) gives for all other copies of interrogatories and depositions 6 1-2d. a sheet. The language is not accurate, but it is doing no violence to it to apply it to all interrogatories, there being no other rate of charge for them expressly provided by the Act. For these reasons I am of opinion that the proper charge for interrogatories is 6 1-2d. a sheet, and not 10d.

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*Clerks of the Masters.*

6. It appears that the clerks of the Masters have charged some small sums for paper, and printing leases and recognizances, in addition to the fee of 1*l.* 16*s.* given to them by Table III. No. 7. I have had some doubt upon this point, but the concluding words of the clause, "but no other charge on occasion of every pair of leases," have satisfied me that the whole expense to the tenant is to be 1*l.* 16*s.*, and I so rule the point.

*Registrar.*

7. It appears that my Registrar, whom I have found to be an intelligent, faithful, and excellent officer, was in the habit of charging 2*s.* 6*d.* for a certificate on any exhibit entered by him as read at the hearing of any case, when required to identify such exhibit as having been read. This was claimed under Table IV. No. 31, which gives 2*s.* 6*d.* for every certificate upon search. The Masters think this fee illegal, and I entirely agree with them and so determine. In my opinion it admits of no doubt. The Registrars are bound without any fee to [\*375] mark the different \*exhibits read during the progress of the cause as part of their general duty.

*Clerks of the Six Clerks.*

8. It appears that the clerks of the six clerks have been in the habit of receiving certain fees of 6*s.* 8*d.*, 3*s.*, and 2*s.* They are not warranted by the Act, and must be discontinued.

*Accountant-General's Office.*

9. In the Accountant-General's office a charge of 5*s.* has been made by the junior clerk for filling up and getting stamped powers of attorney for the transfer of stock. This was sanctioned by Lord Chancellor Hart, but it is illegal, and should not again be received. But the practice of preparing all such powers of attorney in a settled form is highly useful to the suitor, and a proper fee should be paid for it. This will require an express

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order, which my successor and the Master of the Rolls will, I have no doubt, readily make.

These are the only fees which I feel myself called upon to declare illegal. For some of them there has been considerable authority or fair ground upon the supposed meaning of the Acts. I have had the able assistance of the Master of the Rolls upon these points, and he agrees with me upon the several questions which I have decided. I felt myself bound to suspend Mr. W. King from his office, in consequence of his having, in addition to the 1*l.* which he was authorized to take for engrossing certain proceedings, charged three guineas for examining the engrossment, although he was entitled to no fee for that duty, \*and was responsible for the correctness of the engross- [\*376] ment. Each London commissioner has now the original fee of himself and his clerk, and all the duties devolve upon him. It is a great relief to me to find that I am not called upon to visit any other officer with a like penalty, and, speaking generally, although there has been error amongst the officers, there has not been wilful misconduct.

The examiners in chief, however, whilst no other office charged more than 1*d.* a sheet for paper and some only 1-2*d.*, which latter scarcely covered the expense, charged 1*d.* an office sheet, which amounted to 4*d.* a sheet. This charge cannot be defended, and I am, therefore, compelled to admonish Mr. Quinan and Mr. Fenton to be more circumspect in the execution of the duties of their offices for the time to come.

The illegal charges have generally ceased since the attention of the court has been drawn to them, but I must, for the sake of example, direct Messrs. Quinan and Fenton to account before the senior Master for all moneys received by them or their clerks for paper since the Act, and as I think there was no pretence for the charge for certificates under Table VI. No. 8, they must also account in like manner for all sums received on that account. In like manner the Registrar must account for all moneys re-

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ceived by him for certificates under Table IV. No. 31. None of those charges can be justified by any reasonable construction of the Act, which is not the case with the other charges.

[\*377] \*These sums are to be paid to the Accountant-General to an account to be opened in the name of "The Suitors' Return Fee Fund," and the court will hereafter know how to deal with it, so as to give it to the parties really entitled to it.

II. Certain other questions have been raised, upon which it is proper that I should declare my opinion.

*Registrar's Office.*

1. The Registrars have charged, under Table IV. No. 12, a fee of 2s. 6d. for entering a rule in the *rule book*, and also 2s. 6d. under Nos. 13 and 23 for drawing, entering and signing any order, and furnishing a copy of it; and the Masters report their opinion to be, that the latter are duties altogether distinct from those of entering rules, whether side-bar rules or otherwise. I shall confirm their report in that respect, as I am clearly of the same opinion, but the clauses are vaguely and inaccurately expressed.

*Rolls' Office.*

2. At the Rolls' office a fee of 2s. 6d. is charged by the Deputy Keeper of the Rolls for a search, as well as 10s. for taking it into court, and this appears to be authorized by an opinion of the present Chief Baron, when Attorney-General, and nobody is more disposed than I am to treat every opinion of his with respect and deference. These fees belong to the public, and as I have some doubt upon the point, I shall leave it open to be decided hereafter. If a party desire a search and inspection, the fee of 2s. 6d. would be payable under No. 18 in Table II, and if required in court, 10s. would be payable under No. [378] 27 of \*that table. But if an attendance were required with a document, without a previous inspection, then the question would arise, whether the fee would be charged for the search.

III. There are a few remaining questions.

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1. In a few instances there have been short copies, owing to the irregularities of clerks. The principals are bound to see that the copies are full ones, and by a little attention an effectual check may be obtained against carelessness or dishonesty.

2. Deposits have been made by intended tenants for their leases and recognizances, and they have been allowed to accumulate in the hands of the Masters' clerks. They will, I believe all shortly be duly applied. It will be proper to provide in future by an order of the court for the due and immediate application of such deposits.

3. There are many deeds in the custody of the usher; an order of the court will be required for their safer custody, and for ready access to them. But I decline to make an order regulating these matters; that duty will properly devolve upon my successor.

*Purse Bearer.*

4. A question has been raised upon the fee of the purse bearer under No. 6 of Table XVI. I think it clear that he is entitled to the 9s. provided for every private seal, and there will not be much difficulty in ascertaining \*which are private [\*379] and which public seals, but I think that there should, as heretofore, be a small general payment by the six clerks to the purse bearer for that fee.

5. I have but two points remaining; one upon a charge for searches and copies. If a search for a document is required, and a copy is also bespoke, the suitor is charged by the usher for a copy only. But if a search be required and made, and a copy required at any interval of time however short after such search, then fees are charged both for the search and copy; and in the Registrar's and chief examiners' offices a precisely similar practice has prevailed. Now this is a point upon which I cannot make any order, but my opinion is, that where the copy is ordered on the same day, so that really it is one transaction, in most cases simply permitting a communication between the solicitor and his clerk, there should be a charge for the copy only

6. The last point is of a different nature, and has been pointed out to me by the Master of the Rolls, and I entirely agree with him in opinion. It appears that some of the six clerks charged 6s. 8d., instead of 8s. 4d., for a requisition and notice to the bank of Ireland for the amount of stock standing in the name of a party in a cause. Mr. Hudson, when the error was discovered, returned 8s. 4d. in each case. Now this is an error of the officers against themselves, for the 1 Geo. 4, c. 5, s. 2, gives the 6s. 8d. for this particular duty, and that is left untouched by [\*380] the \*Chancery Act. It is quite clear therefore that 6s. 8d. is the proper fee.

This closes the somewhat ungrateful task which I have had to perform, and I hope that it will be found, that whilst I have secured to the suitors and the public their just rights, I have not pressed too hardly upon the feelings of any individual.

The Lord Chancellor having pronounced the foregoing judgment, the Attorney-General rose, and requested to know if his Lordship intended to sit again; his Lordship having replied in the negative, the Attorney-General then said:—"My Lord, I should do great injustice to my own feelings, and I am persuaded to those of the bar of Ireland, if I allowed your Lordship to retire from that seat without attempting, however feebly, to convey to your Lordship the impression of the deep sense which we entertain of the eminent ability and dignified demeanor with which you have discharged the important duties of your high office. Short as has been the period of your Lordship's elevation, it has afforded ample opportunity for the display of judicial powers of the highest degree of excellence; had that period been still shorter, had it been limited to the observation of a single day, it would have been sufficient to have impressed us with an indelible conviction of the profound, extensive and accurate [\*381] \*learning, the patience and discrimination, the masterly exposition and application of the authorities and principles of equity, and above all, of the ardent love of justice, and

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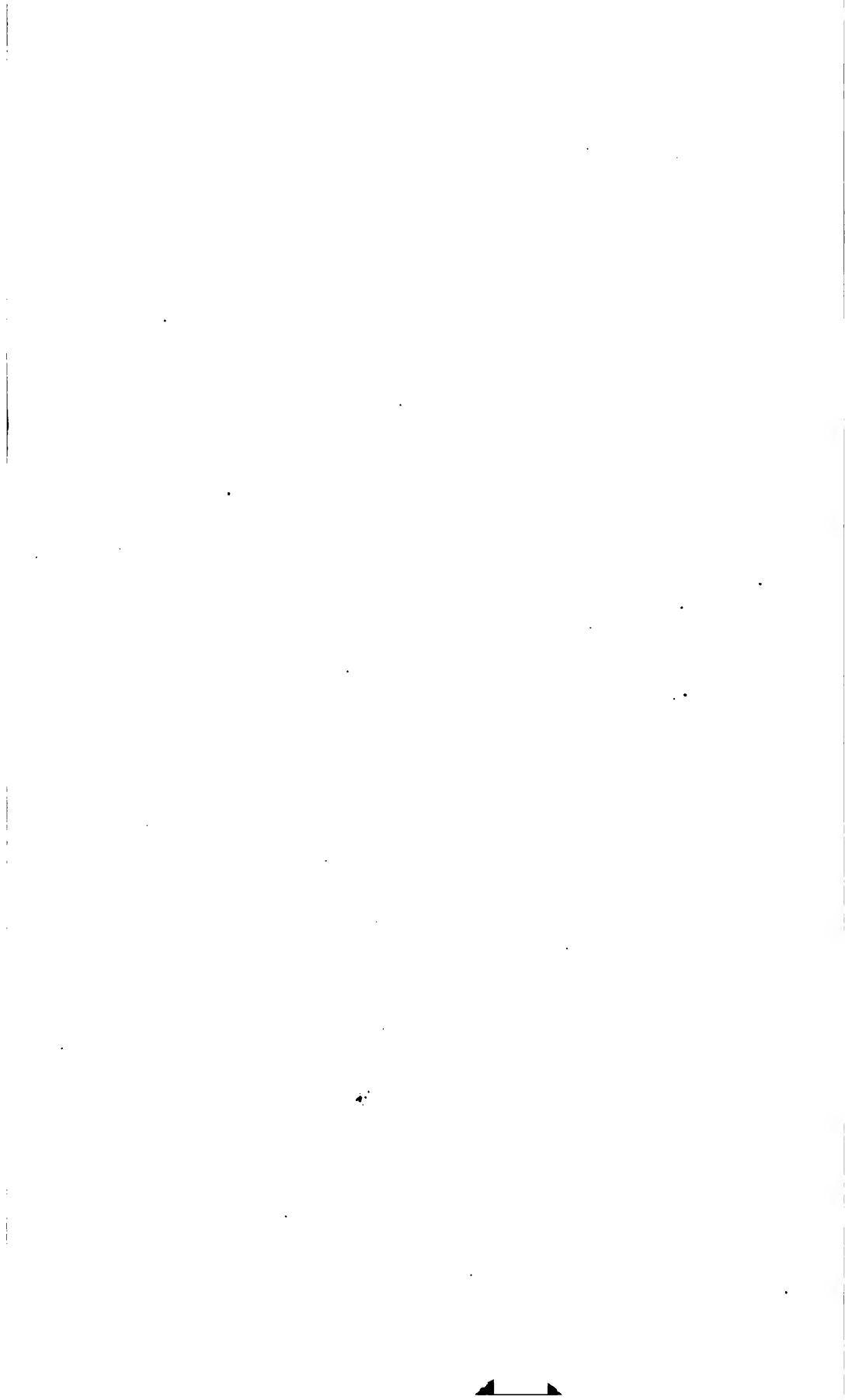
elevated tone of moral feeling, which marked and distinguished your judgments. I have only to add our acknowledgments for your uniform urbanity and kindness, and to assure your Lordship, that you bear with you our regret at your retirement, and our most anxious wishes for your future happiness and welfare."

THE LORD CHANCELLOR:—"This kindness, I assure you, has come upon me altogether by surprise; I am totally unprepared for it. I had not the slightest intimation that I should be favored with the expression of the kind feelings of the bar towards me. You have been pleased to speak with approbation of the manner in which I have discharged the duties of my office; I accepted that office with a deep feeling of my responsibility to God and man, and I firmly believe, that no judge can discharge his duties with satisfaction to himself and the public, who is not impressed with a due sense of the sacred obligations he has incurred. I entertain the highest opinion of the talents and character of the bar of Ireland; with many of them I have had the happiness to live on terms of the most friendly intercourse, which has not failed to endear them to me; and I have every reason to be grateful to the bar at large for their uniform kindness and attention to me. It is, I assure you, the greatest satisfaction to me to think, that in retiring from the duties of the office I have held, I carry with me \*the approbation of a body so distinguished, [\*382] and for which I entertain so great and sincere a respect. A higher reward could not be bestowed upon me."

Mr. *Josias Dunne*, on the part of the solicitors, begged to express their concurrence in the sentiments of the Attorney-General, and to assure the *Lord Chancellor* of their regret at his retirement from the high office which he held with such advantage to the profession and the public at large.

His Lordship having briefly thanked Mr. *Dunne* for the sentiments expressed by him on behalf of the solicitors, retired from the bench.





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I. A. R. having bequeathed his personal estate, subject to the payment of his debts, to two trustees, H. and N., upon trust to place out at interest such money as he should die possessed of, and at their discretion to continue at interest the several sums then standing out at interest, and out of the produce of his personal property to pay his wife R. R. a legacy of 4,000*l.* and an annuity of 200*l.* per annum, and the residue to his daughter, appointed his wife R. R. executrix, and the said H. and N. executors. The testator died in 1796. R. R., H. and N. proved the will, but N.

never acted. In 1797 a settlement was executed on the marriage of the testator's daughter with T. K., to which R. R. was a party, and in which there was a covenant by all the parties thereto, that the residue should be ascertained and paid over within a year to the trustees of the settlement: H., who had been the banker and agent of the testator, but was indebted to him at the time of his decease, was allowed by the executrix R. R. to have the sole management of the assets, which, at the time of the testator's death, were sufficient to pay all demands. H. at different times advanced out of the testator's assets several sums, the interest of which T. K. was permitted to enjoy, and in 1812, became a bankrupt, whereby a large portion of the assets was lost; it appeared from his books that he had made entries appropriating those several sums to the uses of the settlement of 1797. R. R. proved under the commission as executrix, and in the account which was furnished to her by H. and annexed to her deposition, made on the occasion of so proving, referred to the bankrupt's books. Held—that as it was her duty to have examined those books, she was bound by the entries made therein, and that the appropriations must be considered as made with her privity and concurrence, and consequently that she had forfeited her right to be paid the sums due to her under the will of the testator out of the funds so appropriated. *Riky v. Kemmis, and contra*, 101

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# HUSBAND AND WIFE.

1. A ward of court, entitled in her own right to large real and personal property, was married under age, and without the consent of the court, which marriage was

subsequently annulled: upon her coming of age, the husband petitioned to be at liberty to make proposals for a settlement of the ward's property, and to have a legal marriage celebrated, undertaking to execute such settlement as the court should direct. Proposals having been laid before the Master, he approved of a draft settlement, whereby all her property was limited to her for life, for her sole and separate use, and afterwards to her children; but the Chancellor declined making any order as to the execution of this settlement, the amount of the property then in litigation not being ascertained. A second marriage having been celebrated by direction of the court, there was issue thereof two children. The wife subsequently eloped. Held—that the children had no right, during the life of their mother, to be maintained out of her separate estate. Held also—that the proposed settlement, though not executed, having been acted upon by the court by different orders, could not be varied. *In the Matter of Anne Walker*, 299

2. If the court gets a control over the property which belonged to the wife before marriage, her right to a settlement is preserved, except she comes into court to waive that right. *Ib.* 323

3. The wife, by appearing in court, may waive her right to a settlement, in which case no provision is made for the children. *Ib.* 324

4. In cases of contempt, the rule is to exclude the husband entirely from the wife's property. But where the contempt is not very flagitious, a portion is sometimes, though rarely, given to the husband during coverture. *Ib.* 325

5. The husband does not forfeit his estate by the curtesy, nor the wife her jointure by adultery. *Ib.* 326

6. The court has not power generally to provide an alimony for the wife's separate use, but if the court has a continuing power over the wife's own property, it will seise on it to maintain her during desertion. *Ib.* 327

7 Even where there is no contempt or misconduct, the children can only be entitled under and after their mother; they have no independent right. And where there is a contempt, the husband is excluded as against the wife altogether, and generally as against the children also. *Ib.* 327

8. The court cannot, on account of the misconduct of the wife, provide for the children out of her separate property. *Ib.* 328

## I.

### INTEREST.

See WILL 6.

Interest from the death of the testator, allowed upon legacies payable at a future period to infant grandnephews, upon the intention of the testator that they should be maintained out of the property bequeathed to them. *Leslie v. Leslie*, 1

See PRACTICE, 1.

### INSURANCE.

See ASSURANCE.

## J.

### JUDGMENT.

A judgment creditor has not any specific lien on the land, and in general cannot have any relief against a mortgagee who is a specific incumbrancer. *Averall v. Wade*, 262

## L.

### LEASE.

See EXECUTOR, 3, 4.

### MORTGAGE.

### POWER.

### JUDGMENT.

### LEGACY.

See WILL, 5.  
INTEREST.

### LIEN.

See JUDGMENT.

## M.

### MARRIAGE.

See HUSBAND AND WIFE.

**MARSHALLING.**

A second mortgagee having the security of estates A. and B. and offering to redeem a prior mortgage, (having the security of estate A. only, and also leases affecting the equity of redemption of the same estate, but subsequent to the second mortgagee), cannot be compelled by the prior mortgagee to resort to estate B. in the first instance. *Gregg v. Arrott* 246

**MATURITY.**

See **WILL**, 2.

**MISTAKE.**

See **SETTLEMENT**.

**MORTGAGE.**

A prior mortgagee who has obtained leases, subsequent to a puisne mortgagee, and who has entered into possession, will, as against the latter, be charged as mortgagee in possession. *Gregg v. Arrott*, 246

See **JUDGMENT**.

**MARSHALLING.**

**POWER**, 1, 4.

**RENTS**, 1.

**MULTIFARIOUSNESS.**

See **PLEADING**, 1.

**O.****OFFICERS OF COURT.**

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**P.****PARENT AND CHILD.**

See **HUSBAND & WIFE**, 1, 2, 3, 7, 8.

**PERSONAL ESTATE.**

See **EXONERATION**.

**WILL**, 5.

**PLEADING.**

1. A bill impeaching leases, and also seeking to set aside a sale made subject

thereto is not multifarious. *Musherry v. Chinnery*. 213

2. If an estate be sold subject to a lease, the seller cannot afterwards impeach the lease, unless he can at the same time impeach both the sale and the lease. *Id.* 219

**POWER.**

1. Husband and wife, by a post-nuptial settlement, convey part of the wife's estates to a trustee to the use of the husband for life, remainder to their eldest son for life, &c., with an ultimate remainder in fee to the husband, and a power to him to lease "for any time or term of years or lives and with or without covenants for renewal, and in case of the determination of all or any of the aforesaid lease or leases, to make new or other leases thereof in manner aforesaid, and with or without any fine or fines as he should think fit." He was also empowered "to raise or levy, by sale or mortgage, any sum or sums of money not exceeding in the whole 20,000*l.*, or to charge the premises therewith," for such uses as he should appoint; and to charge to any amount for younger children. The husband and wife afterwards executed three leases of portions of the estates comprised in the settlement, for terms of 999 years, upon which fines were taken. One of the leases contained a clause permitting the lessee to graff and burn the surface, and also a clause of surrender; and another contained clauses making the lessee dispunishable for waste and permitting him to cut timber, &c., and to graff and burn the surface, and in this lease was included part of the wife's estate not comprised in the settlement: the latter lease, and also the third lease, were made subject to existing freehold leases. The amount of the fines received, upon the making of these and other leases, was 10,208*l.* The husband subsequently mortgaged these estates, subject to the aforesaid leases, for a sum of 10,600*l.* The mortgagee filed a bill of foreclosure, in the Court of Exchequer, and obtained a decree, in pursuance of which the lands were sold subject to the leases. The first tenant in tail under the settlement filed a bill impeaching the said decree, and also the leases, as having been made contrary to the leasing power. While the cause was at hearing the plaintiff entered into a compromise with the purchaser. Held—that the consideration of the question, as to the validity of the sale, having been by these means withdrawn from the court, the leases could not be impeached in the

absence of the purchaser, and that the plaintiff's bill must be dismissed. Held also—that the leases were not an undue execution of the leasing powers. *Musherry v. Chinsery*, 185

2. Under a power to lease at any rent, a nominal rent may be reserved. *Ib.* 225

3. Under a power to charge any sum for younger children the whole estate may be disposed of. *Ib.* 226

4. *Semble*—that a lease may be a good execution of a power to raise or levy by sale or mortgage a certain sum, or to charge the estate therewith. *Ib.* 226

5. Where the power is unlimited, a clause permitting waste does not invalidate the lease. *Ib.* 228

6. Where the transaction is *bona fide*, and the terms of the power do not require the number of years to be absolute, a clause of surrender does not vitiate a lease. *Ib.* 229

7. A lease under an unrestricted leasing power, including lands not comprised in the settlement, and by which one entire rent is reserved, is not invalid, for, if the lessee be evicted, there would be an apportionment of the rent at law in favor of the person entitled under the settlement. *Ib.* 230

#### PRACTICE.

1. The court rate of interest, where no rate is fixed by the parties themselves, is in this country to be calculated at five per cent., pursuant to the 204th new rule, which was held to apply to a legacy, under a will made prior to the publication of the rule. *Leslie v. Leslie*, 4

2. Notwithstanding the 4 & 5 Wm. IV. c. 78, a replication cannot be filed, without an office copy of the answer being taken out; but after a decree an answer is a paper or document, within the 17th section of that Act, of which the suitor may have a partial copy. *Birch v. Hutchinson*, 363

See WASTE.

#### PURSE BEARER.

See OFFICERS OF COURT.

#### R.

##### RECEIVER.

See RENTS, 2.

##### REGISTRAR.

See OFFICERS OF COURT.

#### RENTS. (BY-GONE)

1. R. G. on the marriage of his daughter with R. T., by a settlement of 1815, conveyed certain premises held under a lease for three lives or forty-one years, upon trust to raise 500*l.* and to pay the interest thereof to R. T. during the joint lives of R. T. and wife, and after his decease to his wife as jointure, and after her decease to pay the principal to the issue of the marriage; and it was agreed that said sum of 500*l.* should remain a charge on said lands for six years, and then be raised out of the rents at the rate of 50*l.* per annum with interest. R. G. having become indebted to O. K. on the 23d of January, 1822, with the concurrence of R. T. and wife, granted to him a rent charge of 50*l.* a year out of a part of the said premises until the debt should be paid off; and, also, on the same day, with the like concurrence of R. T. and wife, demised to him the remainder of the said premises at a rent of 50*l.* a year, to be retained until he should be paid off; and in 1823, in consideration of a further sum, mortgaged to O. K. the said last mentioned premises. Held, that the settlement of 1815 could not be viewed as a mortgage, and that O. K. having dealt with the estate with notice of that settlement, was accountable for the by-gone rents from the period at which he entered into the possession. Held, also, that as the interest in the premises depended on one old life, there should be a decree for immediate payment. *Turkington v. Kearnan*, 35

2. D., tenant for life of estates in Ireland, by a deed of 1799, conveyed them for the payment of his debts to trustees, who issued debentures to the creditors. H., a debenture creditor, suing on behalf of himself and the other creditors, obtained a decree in the Court of Chancery in England, to carry into execution the trusts of the deed of 1799, and afterwards filed a bill in the Court of Chancery in Ireland to enforce that decree; that bill was dismissed, but the decree of dismissal was reversed by the House of Lords on appeal, who declared that the Court of Chancery

in Ireland was bound to give effect to the English decree, and appoint a receiver over all the trust estates for the benefit of all the creditors. Before the bill was filed in Ireland by H., other debenture creditors had taken proceedings in this country, and subsequently, through the medium of receivers, realized a fund out of portions of the trust estates, which was lodged in court to the credit of their causes. Held, that H., not having made those creditors parties to the bill filed by him in Ireland, was not entitled to any part of the fund realized by them prior to the decree dismissing his bill; but as to the fund which accrued subsequently, he was entitled to come in *pari passu* with the other creditors, as, had the decree in his cause been rightly pronounced by the court below, he would have obtained a receiver at that time. *Salt v. Donagall, and other causes*, 82

## RESIDUE.

See WILL, 5.

## ROLLS OFFICE.

See OFFICERS OF COURT.

## S.

## SEPARATE ESTATE.

See HUSBAND AND WIFE.

## SETTLEMENT.

1. A marriage settlement recited an agreement to convey a certain estate, save and except the lands of Ballyhenry and its sub-denominations, but the operative part of the deed purported to convey by name, as a separate denomination, the lands of Killahan, which it was proved, were reputed a sub-denomination of Ballyhenry. Held—that there was not sufficient evidence of mistake to justify the court in striking Killahan out of the settlement. *Alexander v. Crobie*, 145

2. *Smble*, the court will reform a settlement where the mistake is clearly, established by parol evidence, even though there is nothing in writing to which the parol evidence may attach. *Id.* 150

See HUSBAND AND WIFE.

## SOLICITOR.

See CURRENCY.

## SPECIAL PERFORMANCE.

A postnuptial agreement, in writing, by which a father undertook to make a provision for a child, will be specifically executed, being a contract founded on a meritorious consideration. *Ellis v. Nimmo*, 333

## STATUTES.

See CURRENCY.  
PRACTION, 2.  
OFFICERS OF COURT.  
TRUSTEES.

## SURRENDER.

See POWER, 1, 6.

## T.

## TRUST. (RESULTING)

A father, on the marriage of his daughter M., covenanted with the intended husband to pay a sum of 500*l.*, "the marriage portion of his daughter," to be vested in trustees upon trust to pay the said M. 30*l.* a year, the interest thereof during her life, and after her death and that of her husband, to hold the same to the use of the issue of the marriage. The husband died in the lifetime of his wife, and there was no issue of the marriage. Held—that as to so much of the 500*l.* as was not exhausted by the uses of the settlement, there was a resulting trust for M. *Ward v. Dias*, 177

## TRUSTEES.

1. The infant heir of a mortgagee, who had obtained a decree for a sale, being out of the jurisdiction, held a trustee within the 8th and 18th Sects. of the 1 Wm. 4, c. 60. *Prendergast v. Eyre*, 11

2. The court will not appoint new trustees under the 1 Wm. 4, c. 60. s. 22, except in plain cases. *In the Matter of Nicholls, Minor*, 17

3. The court will not appoint a new trustee under the 23d section of the 1 Wm. 4, c. 60, where no bill has been filed, and there is no power to do so in the instrument creating the trust, unless a disability exist such as is pointed out by the previous sections of the Act, viz., infancy, lunacy, &c. *In the Matter of Gerald Fitzgerald, Petitioner*, 20



4. Before the court has jurisdiction under the 23d section, there must be a case where the party might apply by petition, under the former sections of the Act. *Ib.*

5. The court will not appoint new trustees under the 1 Wm. 4, c. 60, s. 22, except in a plain case, or where there has been a recent creation of trust, and the court has jurisdiction by reason of disability or the like. The insecure nature of the property is no ground for the interference of the court. *Whitley v. Fishbourne*, 23

6. The court refused to appoint new trustees under the 1 Wm. 4, c. 60, in the room of trustees who had died, where the trust property consisted both of stock and real estate, no administration having been taken out to the survivor of the said trustees (who died intestate), and his heir at law being out of the jurisdiction. *In the Matter of Anderson*, 27

7. It was not intended by the 9th and 10th sections to supply the want of a personal representative of a trustee of a chattel interest, or stock. *Ibid.*

## V.

### VENDOR AND PURCHASER.

See PLEADING.

## W.

### WARD OF COURT.

See HUSBAND AND WIFE.

## WASTE.

Although the bill may be dismissed, so far as it seeks to set aside a lease made to the defendant which permitted waste, and which is a good lease as against the lessor, yet it is within the province of the court while the sum due to the plaintiffs remains unpaid, to prevent any waste which may tend to injure their security. *Turkington v. Kearnan*, 45

See POWER, 1, 5.

## WILL.

1. A. by his will, left a certain leasehold for lives renewable forever, and a leasehold for years, and his stock in trade,

&c., to trustees, upon trust, for his daughter, for life, and after her decease "to and amongst the issue of his said daughter, lawfully to be begotten, in such shares and proportions as his said daughter should by her last will and testament appoint, *provided such child or children should arrive at the age of twenty-one years*, and for want of such issue, or in case of the death of such issue, and of the death of his wife," then over. Held, that the daughter took an estate for life only, and that the limitation over was good. *Ryan v. Cowley*, 1

2. Testator gave to his daughter M. 1,000*l.*, and the residue of his property to the child with whom his wife was then pregnant; and in case said child should not be born alive, or not arrive at the age of maturity, he directed the property allotted to her to be given to his daughter M.; and in case M. should die before marriage, then her portion to the child with whom his wife was pregnant; and in case they both died *without arriving at the age of maturity, then over to third persons*. The posthumous child was born alive, and M., who survived, died before sixteen, and both unmarried. Held—that in this case maturity meant marriage, and that the gift over took effect. *Bergin v. Woodlock*, 140

3. A. S. being seised in fee of certain lands, devised the same to W. S. for life, with remainders over, and expressed it to be his particular desire, that his executors, whilst acting in the management of his affairs, and W. S., when he should enter into the receipt and management of the rents, should continue B. E. L. in the receipt and management thereof, and should likewise employ and retain him in the receipt agency, and management of the rents of such other lands as should be purchased in pursuance of the directions of his will, at the usual fees allowed to agents. Held—a trust for B. E. L., and that the devisees were bound to retain him as agent at the usual fees. *Lawless v. Shaw*, 154

4. If a property be given by will absolutely and without restriction, the court will not lightly impose upon it a trust upon mere words of recommendation or confidence. *Ibid.*, 164

6. Testator was entitled to a rent charge or annuity (issuing out of an estate of a tenant for life), equivalent to the amount of the annual interest upon the purchase money of the annuity, and the annual premiums payable upon policies of assurance effected upon the life of the tenant

for life, to secure the repayment of the principal; and by a subsequent parol agreement, the annuity was made determinable by either party. Held—upon the entire transaction, that this annuity and the policies, being merely the securities for a debt, passed under a bequest of all the "*outstanding debts owing*" to the testator. Held also—that the word "*debentures*" in a will, was sufficient to include general policies of assurance. Testator having bequeathed "all the outstanding debts owing to him for tithe or otherwise, *subject* to his debts and legacies," and having appointed general residuary legatees. Held—that the outstanding debts, and not the residuary fund, should be applied in the first instance to the payment of the debts and legacies.

6. A bequest to M. E. testator's wife, "of the legal interest on bonds, deben-

tures and funded property, together with household furniture, &c., to be disposed of as she shall think proper." And in case F. E. should survive the said M. E., that he should have "the interest of money and whatever does belong to her that she does not dispose of." Held—that M. E. having survived F. E. the absolute gift was not cut down by the subsequent bequest over, and that that bequest was void for uncertainty. *Phillips v. Eastwood*, 270

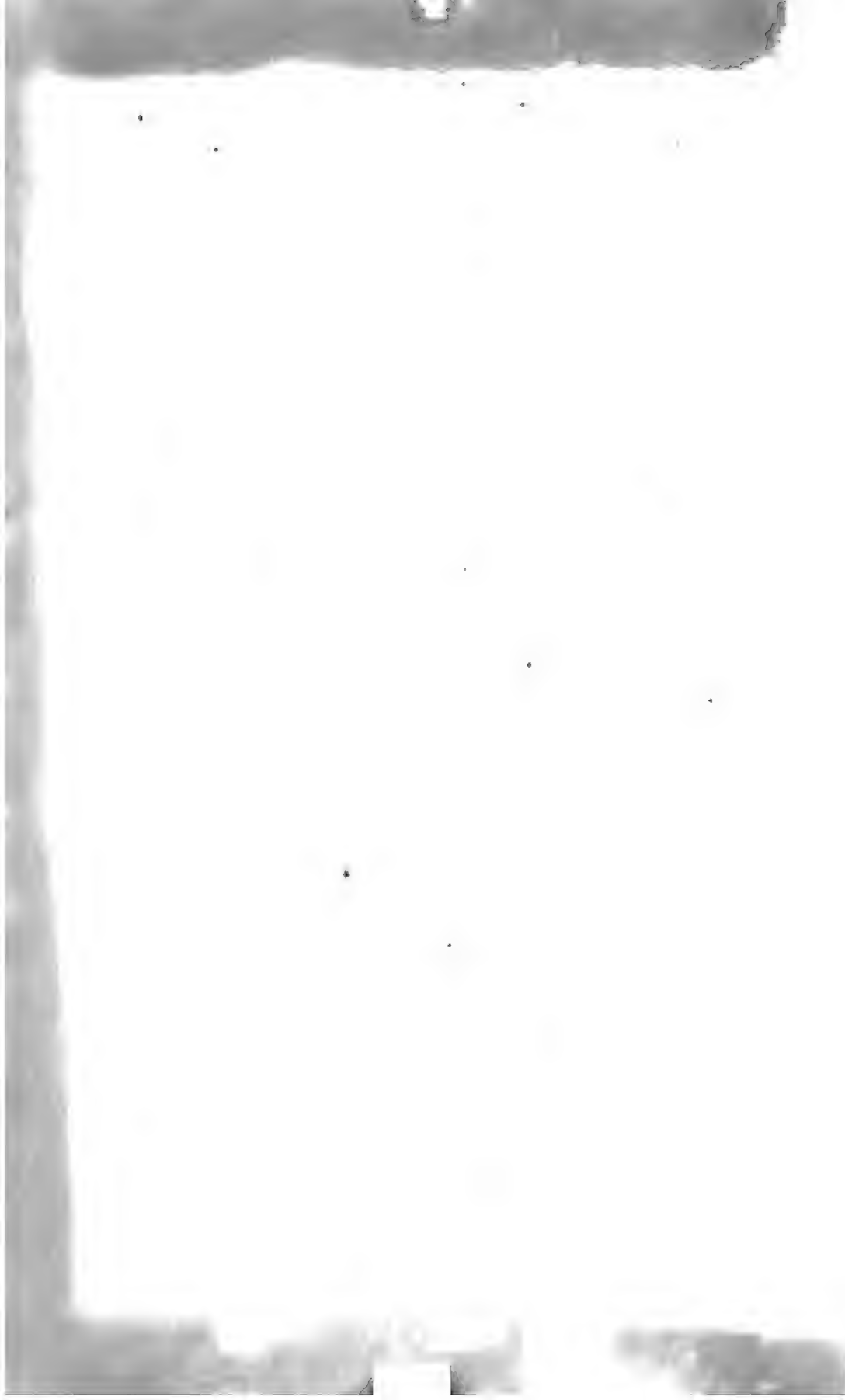
7. A policy of assurance on the life of a debtor, is a security for a sum to be paid, and may pass in a will under the words debentures or debts. *Ibid*, 291

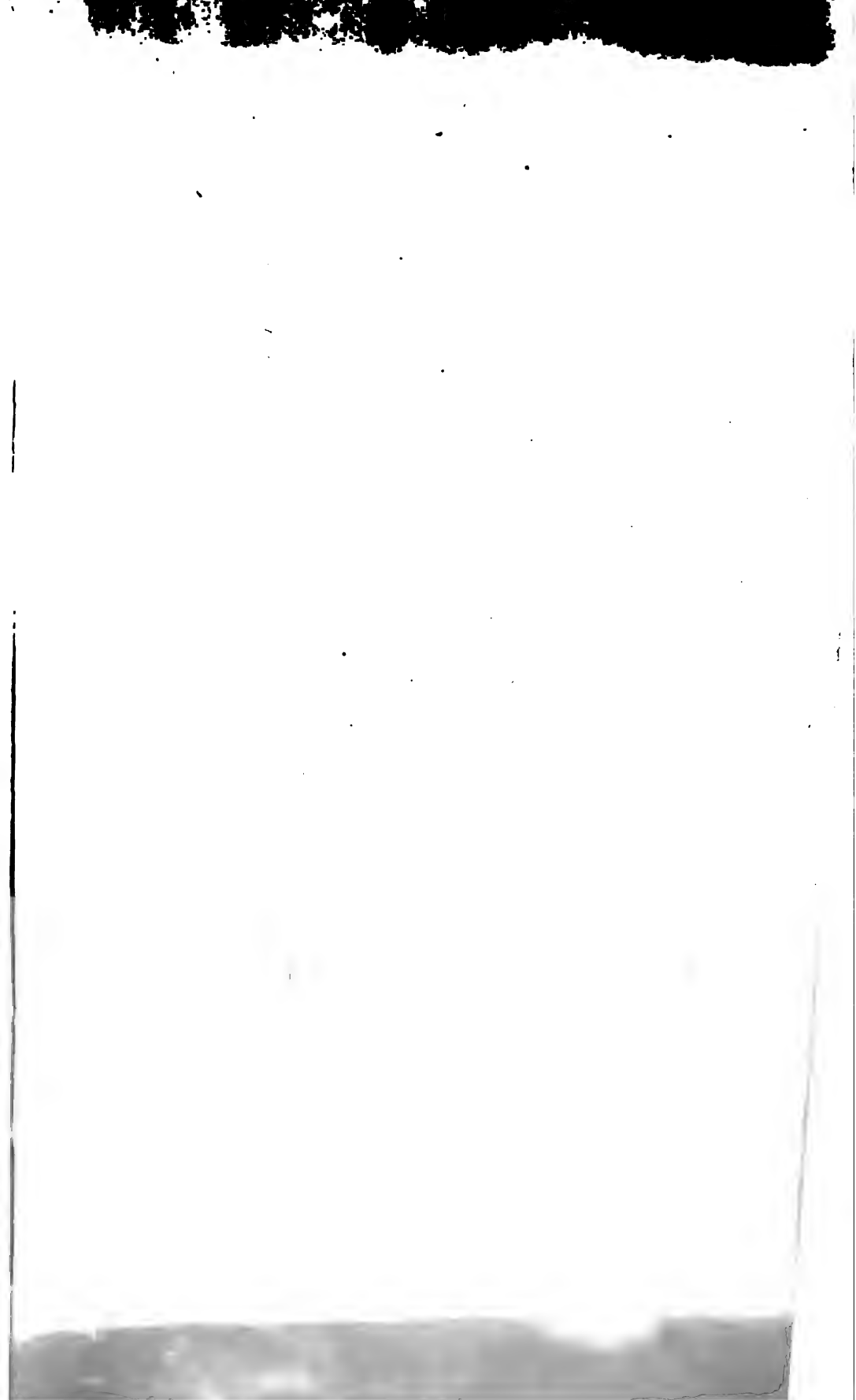
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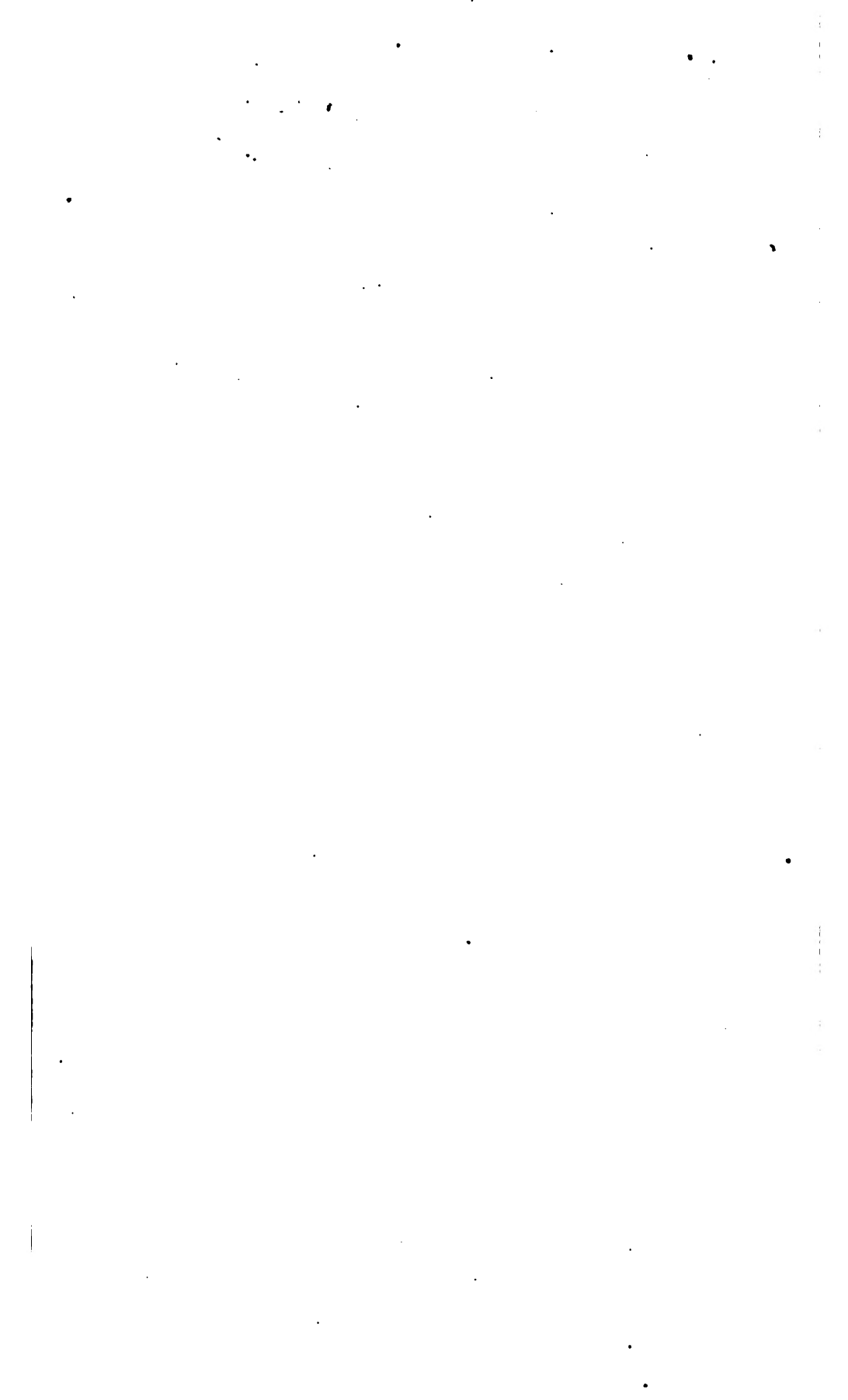
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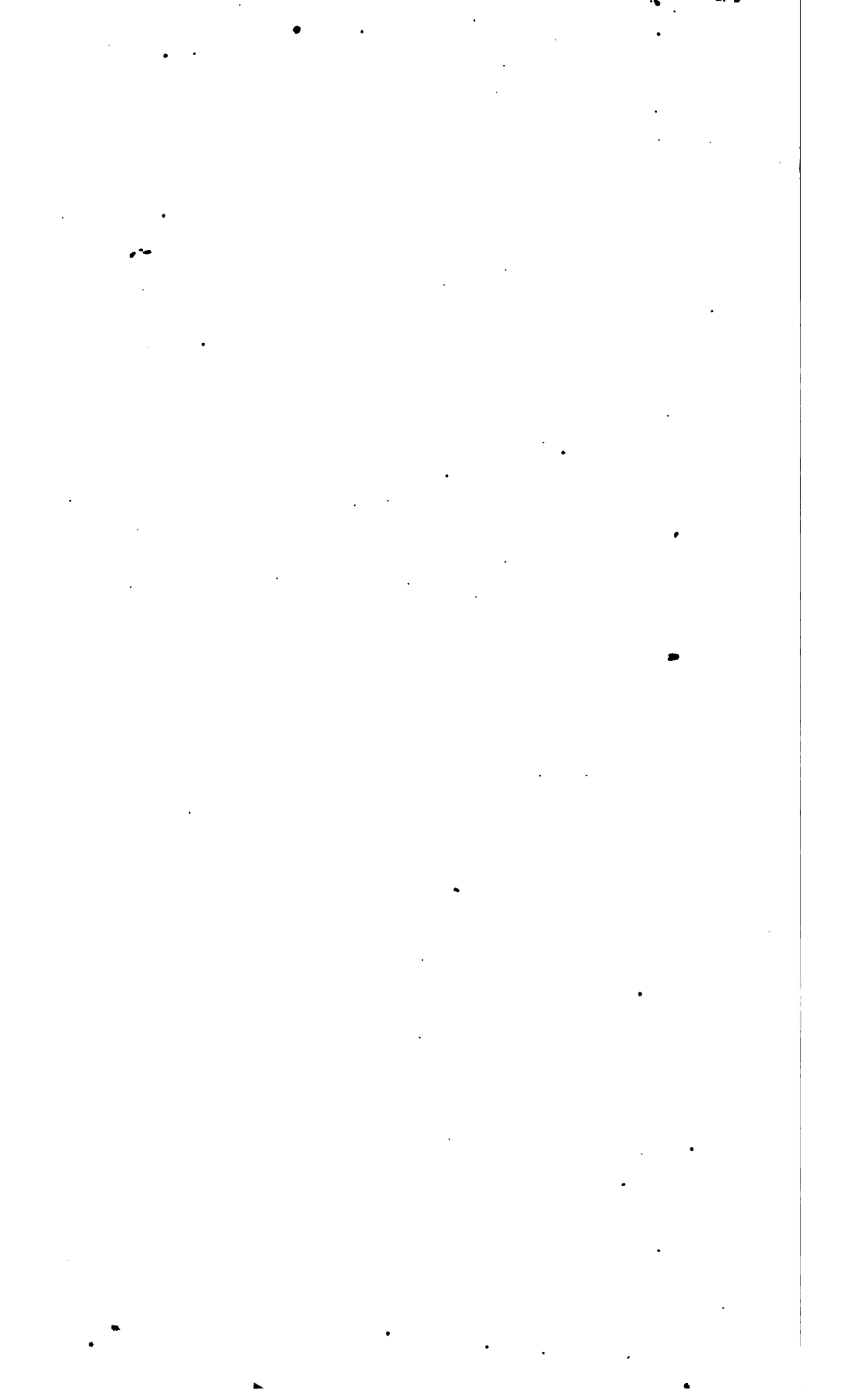
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